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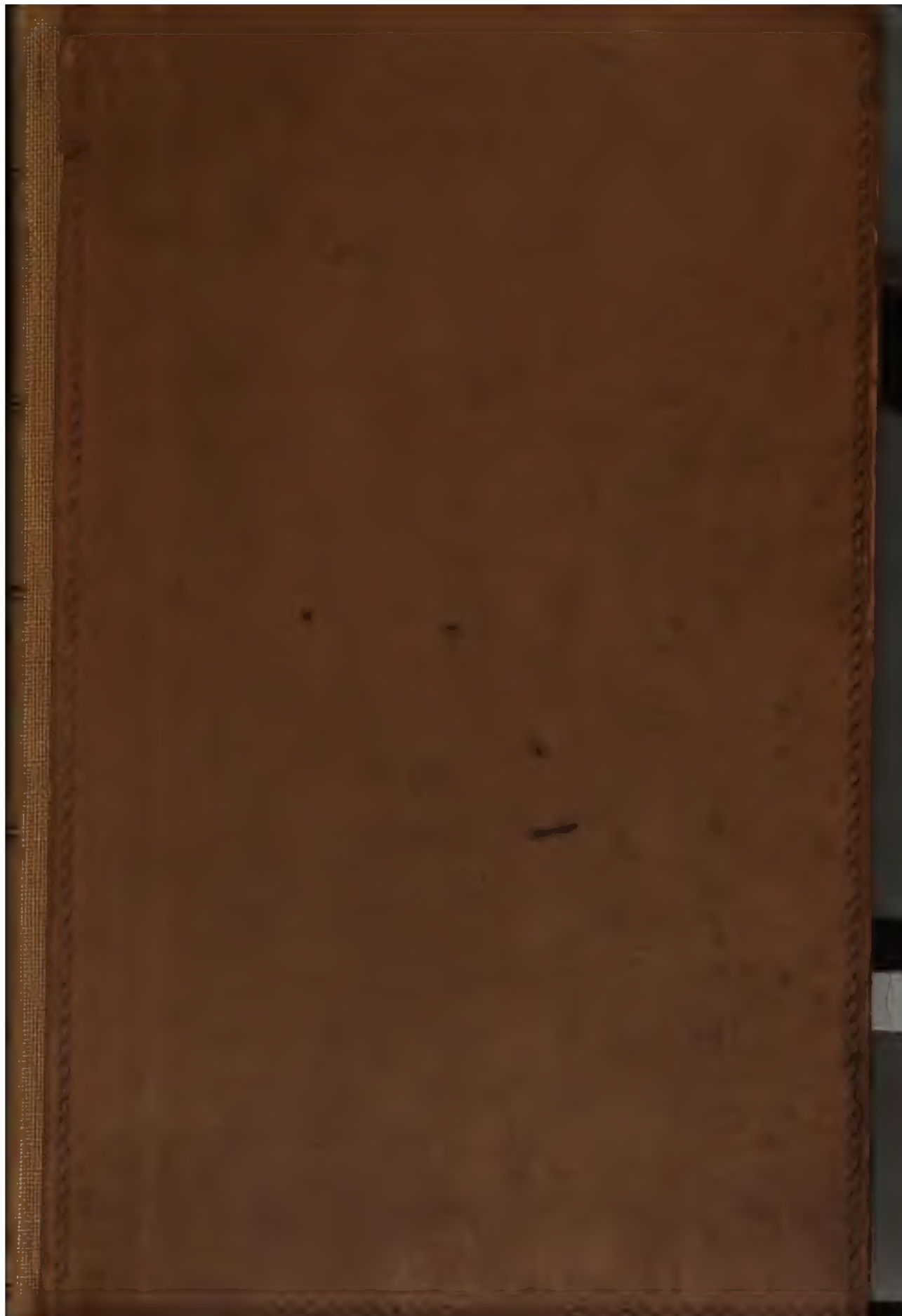
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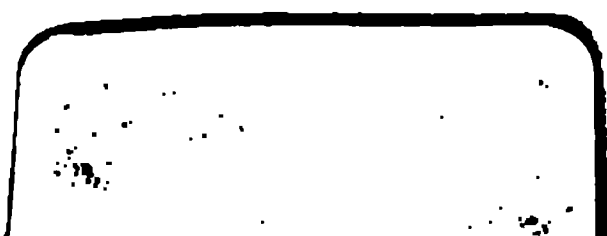
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REPORTS OF CASES
ARGUED AND DETERMINED
IN
The High Court of Chancery,
DURING THE TIME OF
LORD CHANCELLOR THURLOW,
OF THE SEVERAL
LORDS COMMISSIONERS OF THE GREAT SEAL,
AND OF
LORD CHANCELLOR LOUGHBOROUGH,
FROM 1778 TO 1794,
WITH
AN APPENDIX OF CONTEMPORARY CASES.
BY WILLIAM BROWN, Esq.

BARRISTER AT LAW.

VOL. III.

THE FOURTH EDITION.

WITH
REFERENCES TO FORMER AND SUBSEQUENT DETERMINATIONS,
AND TO THE REGISTER'S BOOKS.

BY THE
HON. ROBERT HENLEY EDEN,
OF LINCOLN'S INN, BARRISTER AT LAW.

LONDON:

PRINTED FOR W. CLARKE AND SONS, R. PHENEY, C. HUNTER,
S. SWEET, AND S. BROOKE; AND R. MILLIKEN, DUBLIN.

1819.



S. BROOKS, Printer,
35, Paternoster-Row, London.

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IT may be a necessary information to future, though not so to present Readers, that the decrees towards the close of this Volume, bearing date the **24th May, 1792**, were not pronounced publicly in Court with the grounds of adjudication, but sent down in writing to the Register's Office, from whose Minute Book they are here extracted (except the common and usual directions) with the reasons where the same were given : where they were not, they may generally, in some degree at least, be gathered from the state of the cases, the arguments of counsel, or authorities cited by them, or the ideas thrown out at the hearing by the Lord Chancellor, which are for that purpose as amply stated as the Reporter's original notes would permit.

*No. 25, Great Shire Lane, near
Lincoln's-Inn, 1st November,
1792.* }

C A S E S
ARGUED AND DETERMINED
IN THE
High Court of Chancery.

SITTINGS BEFORE
MICHAELMAS TERM.

30 GEO. III. 1789.

EDWARD Lord THURLOW, Lord High Chancellor.

Sir RICHARD PEPPER ARDEN, Knt. Master of the Rolls.

Sir ARCHIBALD MACDONALD, Knt. Attorney-General.

Sir JOHN SCOTT, Knt. Solicitor-General.

Ex parte **SMITH** in the Matter of **LEWIS** and **POTTER.**

**Lincoln's-Inn
Hall, November 5,
1789.**

THIS petition prayed that a debt proved by Sir *James Esdaile* and Co. under the commission against *Lewis and Potter*, on certain notes and bills, which had been indorsed by the bankrupts, might be expunged, on account of the holders having, since the proof of the debt, discharged the acceptors of the bills and drawers of the notes, without notice to the indorsers or their assignees. The first note which was included in the prayer of this petition, was a promissory note made by *Barber to Powell*, and endorsed by
ceptor without notice to the assignees of the indorser, he thereby also
indorser's estate, and the proof of his debt must be expunged.

Where the indorser of a bill of exchange becomes bankrupt, and the holder proves the amount of his bill under his commission, and afterwards compounds it and discharges the ac-
discharges the in-

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Powell to *Lewis* and *Potter*, who having occasion to discount it, endorsed it to *Esdaile* and Co. *Lewis* and *Potter* became bankrupts before the note became due. The note not being honoured when it fell due, Sir *James Esdaile* and Co. proved the amount in *June* 1788, under the commission against *Lewis* and *Potter*; after which they proceeded at law against *Barber* and *Powell*, to judgment; and then, there having been a proposition on the part of *Barber* to pay 15s. in the pound to all his creditors, in full discharge of their debts, *Esdaile* and Co. accepted the same, and gave a full discharge to *Barber* for the amount of this note, without the consent or privity of the assignees of *Lewis* and *Potter*.

Against the petition, it was said, that the rule, which prevailed where the drawer or indorsers were solvent, could not prevail where the indorser was a bankrupt: the meaning of that rule, which requires immediate notice to be given to the drawer, was, that the drawer, upon taking up the bill, might recover from the acceptor, the amount of those effects, supposed to be in his hands, in respect of which the bill was drawn; and so, in the case of a promissory note, where the drawer did not pay at the time, notice was required to be given to the indorser, in order that he may take it up and recover over against the drawer; and the consequence is, that if the holder of the note or bill, instead of giving notice to the drawer or indorser, will compound with the acceptor of the bill or maker of the note, and discharge him in respect thereof, he precludes the drawer or indorser of this advantage; and, therefore, shall not afterwards call upon them for payment. But where the indorser is a bankrupt, as in the present case, such notice cannot be necessary; nor can it be necessary to have the consent of the assignees to accept a composition, when it appears to be a *bonâ fide* transaction; for the indorser being bankrupt, it is impossible he should take up the note himself, which is the only reason of the notice being necessary. It would be a very unreasonable rule which required the holder of a bill or a note to accept, at his peril, a fair composition from the acceptor, which was the best that his circumstances would allow, and which was made upon a full investigation of his affairs: that, if any fraud appeared in the particular transaction, and that in fact the composition taken was not the best bargain that the holder could make, this would be an answer in the particular case: but that the general rule, as between solvent persons, ought not to apply generally, where the party to whom notice was expected to be given was bankrupt.

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Lord Chancellor.—I have before decided that the doctrine of notice, which holds amongst solvent persons, does not apply as between bankrupt estates: but here, the indorser only was bankrupt, the maker and the payer of the note were not. The debt, proved by Sir *James Esdaile*, was undoubtedly well proved at the time,

time, and the question is, whether the subsequent conduct of the creditor has destroyed that interest which he acquired by such proof. By the composition which he has made with the drawer of the note, which goes to the length of discharging of the drawer, he certainly has prevented the assignee of the indorser from coming on the drawer of the note for payment of what his estate shall pay in consequence of the proof; and yet, on the other hand, it does seem a strong thing to say, that where there are many names on a bill, one of whom is insolvent, though not bankrupt, and the other bankrupt, and the holder proves under all the commissions, and then makes a composition, *bonâ fide*, with the insolvent person, and obtains from him all that he possibly can, that he shall, thereby, be deprived of the benefit of all the provision made by him under the commissions against the other parties who stood on the bill posterior to the party compounded with. And I am well satisfied, in this case, Sir *James Esdaile* did, in fact, make the best terms he could with the drawer of the note by taking 15s. in the pound of him in full. And whatever difficulty I may find in making a precedent which allowed of such a composition, without giving notice to the assignees of the indorser, I am convinced that the justice of this particular case, if it stood alone, would not require me to expunge this debt. The case made does not impute any fraud to the transaction of this composition; but, on the contrary, the holders used all their diligence at law against the drawer of the note and the payer, and then made the best terms they could with the acceptor; though, at the same time, they have gone to the extent of acquitting him altogether in respect of the note. However, whatever may be the circumstances of the present case, I think, in point of precedent, it may be dangerous to say, that after such an acquittal, the holder may resort to the indorser's estate. It is, certainly, open to this sort of fraud, that when the holder sees that, in one way or other, he is sure of his 20s. in the pound, he may favour an acceptor, at the expence of an indorser, by compounding with the acceptor for just so much as he conceives will be the deficiency under the indorser's commission. In this view, it may be a dangerous precedent; and I cure this danger by saying, generally, that the holder of paper shall not compound with the prior names on the bill, *but with the consent of the assignees of the posterior party*. And it is not an answer to say, that if any fraud is practised in the composition, that shall take it out of the general rule. It is much better, and more convenient in practice, to have a precise rule to go by; and justice will, in general, be better done to all parties. It is not that notice is strictly necessary; but I go upon this, the debt is well proved against the indorser's estate; this gives his assignees a right of action against the acceptor or drawer, for the amount paid out of the indorser's estate: but this right is cut away by the composition and discharge given to the acceptor by the holder.—Therefore it is better to say,

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let the assignees either take the whole, or permit the holder to make the most of it he can against the acceptor. I think, therefore, the debt must be expunged.

A few days afterwards this case was mentioned again; when his Lordship said, he had considered it a good deal, and had conversed on the subject with some of the judges, and he was satisfied that the holder must get the consent of the assignees of the indorser, before they can discharge the acceptor without discharging the indorser's estate at the same time (a).

(a) The doctrine has been much discussed in several modern cases, the principles extracted from which may be stated as follows. The several parties to a bill are chargeable in different order; the acceptor is first liable, and the indorsers in the order in which they stand in the bill: the holder may at his election sue all or any of the parties to it. He has the sole dominion of the bill, and may make what arrangements he pleases with any of them, but he does it at his peril; for if he thereby alter the situation of any other person on the bill to the prejudice of that person he cannot afterwards proceed against him: therefore, though he may give time to or discharge his immediate indorser, (as the suing or taking a

security from one of the parties liable has been held not to discharge another who is liable prior to him in point of order,) he cannot give time to or discharge the drawer or acceptor, and afterwards proceed against an indorser. *Tindal v. Brown*, 1 T. R. 167. *Walwyn v. St. Quintin*, 1 B. & P. 652. *Smith v. Knox*, 3 Esp. N. P. C. 46. *English v. Darley*, ib. 49, and afterwards upon motion for a new trial, 2 B. & P. 61. *Gould v. Robson*, 8 East. 576. *Clarke v. Derlin*, 3 B. & P. 363. *Ex parte Gifford*, 6 Ves. 802. *Withall v. Masterman*, 2 Campb. N. P. C. 179. As to the common doctrine respecting the discharge of the principal by giving time to the surety in cases of bonds, &c.; vide *Nisbett v. Smith*, ante, vol. ii. 579.

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MICHAELMAS TERM.

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MOLESWORTH v. MOLESWORTH.

Legacy to a female infant, with power to trustees, in case of misbehaviour, or marriage without consent, to diminish it; and which legacy was comprised in a miscalculation of the number of legacies which were given over to the wife in case of the legatees dying before becoming entitled, lapsed by the death of the legatee; though, by the words of the gift, it would have been vested.

THE Honourable Coote Molesworth made his will, dated 1st October, 1782, and thereby gave to *Richard Molesworth* and *Nathaniel Nicholls*, their heirs, executors, administrators, and assigns, all his messuages, lands, tenements, and hereditaments, goods, plate, mortgages, &c. real and personal, upon trust to raise and pay such sums of money as they, from time to time, should think proper, for the comfortable support and maintenance of his dearly beloved wife, for and during the term of her natural life;

and

and from and after the decease of his said wife, then upon the further trust that his trustees should apply the full sum of £3,000 sterling to and for the sole and separate use of his grand niece Henrietta Maria Molesworth, *subject nevertheless to the controul and discretion of his trustees* thereby invested in them, (that is to say) that if the said *Henrietta Maria Molesworth* should hereafter, in any *flagrant instances*, misbehave herself, or should marry against, or without the advice and consent of his said trustees, or the survivor of them, then he did authorise and empower his said trustees, to withhold or deduct from the said sum of £3,000, as his said trustees should in their judgment think proper, according to the nature and degree of said misbehaviour; and he did, thereby, direct that his said trustees should receive, employ, and apply to the best seeming advantage, all such sum or sums of money as should be so withheld and deducted, for the sole use, benefit, and behoof of his said wife, with full liberty to dispose of the same, either during her life or by will. He then gave, after the decease of his wife, several pecuniary legacies (24 in number, other than that one legacy of £100 was given, “to the now four children of “*Archibald and Mary Grant*, to be equally divided, share and “share alike, wishing that each of them may have the liberty of “managing his and her respective share, as he or she may chuse.”) The testator then provided that, “if his estate and effects, after the decease of his said wife, and after payment of the said legacy, or sum of £3,000, should fall short of paying the legacies before given, that the said several legacies, (except the said *Henrietta Maria Molesworth’s*) should abate in proportion to the several legacies given to them respectively,” and proceeded thus, “of the legatees mentioned, 24 in number, it is at least possible that one or more may die before he, she, or they become entitled to his, her, or their legacy or legacies, and, in that case, his will was, that the sum or sums so given, should revert and return to the sole use, benefit, and behoof of his said wife.”

The will appointed no executors; but, by a codicil, *Molesworth* and *Nicholls* were appointed executors.

The testator died in *December, 1782*: *Henrietta Maria Molesworth* survived the testator, and died in *December, 1784*, aged 23 years, unmarried and intestate, and the plaintiff, her father, obtained letters of administration to her. *Maria Molesworth*, the testator’s widow, died in *November, 1785*, and, by her will, made two of the defendants who were appointed executors by the codicil to *Coote Molesworth*, executors of her will.

The plaintiff, as administrator of his late daughter, applied, after the death of the widow, to the defendants for payment of the £3,000, the legacy given to her by the will; and they refusing to pay the same, he filed the present bill, praying (*int. al.*) that it might be declared that the legacy vested in *Henrietta Maria Molesworth*, and that the same might be paid to him.

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A gift of £100 to the four children of *A.* to be equally divided, considered as the separate legacies.

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Mr.

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Mr. Solicitor-General, Mr. Lloyd, and Mr. Alexander, for the plaintiff.

The only question is, whether the legacy was vested, or whether it was so affected by any thing as to make it not payable, on account of the death of the legatee in the life-time of the wife.

It comes within those cases that have been decided, on the ground that the legacy was vested, though the payment of it was postponed on account of the circumstances of the estate. *Dawson v. Killet*, (ante, vol. i. p. 119.) *Holme v. Monkhouse*, (ibid. p. 298.) and a variety of other cases, shew that legacies so circumstanced are vested.

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The authority of the cases to the contrary, in the Exchequer, of *Norris v. Huthwaite*, (cit. ante, vol. i. p. 299.) and *Smith v. Salmon*, (cit. ibid.) which alone occasioned any doubt upon the subject, have been over-ruled by Lord Kenyon, in *Benyon v. Madison*, (ante, vol. ii. p. 75.) and by the barons of the Exchequer, in the case of *Hamilton v. Sneyd*, in June, 1787, where £200 were given to *Hampton* a trustee, to the use of one for life; and after her decease to *Ann Sneyd*, if she married to be paid to her, but if she died unmarried, then to be divided between *Edward Sneyd* and *William Sneyd*: *Ann Sneyd* died unmarried, and one of the brothers also died; but his share was held to have vested. In this case, if the will had stopped without the particular clauses, there is no doubt the legacy would have been a vested legacy. Then, with respect to the powers reposed in the trustees, it is a condition subsequent, which will not prevent the legacy from vesting. If a legacy be given to an infant with interest, and to go over if the infant does not attain a particular period, that does not prevent the legacy vesting: and, upon a condition subsequent it is perfectly clear, that if it never happens, it is the same as if it never was in the will: if it becomes impossible by the act of God, the legacy is absolute: here she has not misbehaved, but has died. In *Peyton v. Bury*, 2 P. W. 526, the condition having become impossible, by the death of one of the trustees, the legacy was held to be vested. Then the only remaining question is with respect to the lapsing of the 24 legacies, in case of the death of the legatees in the life-time of the wife; but this is a totally separate legacy, those are legacies of particular sums as pecuniary legacies, and counting the £100 to the now four children of *Archibald* and *Mary Grant* as one legacy, as we contend it ought to be counted, there are just 24 legacies, exclusive of this sum given to the trustees for the benefit of Miss *Molesworth*.

But Lord Chancellor, thinking these four separate legacies of aliquot parts of the £100 to each child; and that the testator had only mis-reckoned the number of his legatees, and meant Miss *Molesworth's* legacy to be no more vested during the life of the wife than the others (although he allowed that had it not been for the

the superadded words, it would, by the prior gift, have been a vested legacy) held that it lapsed by her death in the life-time of the wife, and dismissed the bill (a).

(a) This decree, which is obviously erroneous, was afterwards reversed by Lord Rosslyn, post, vol. iv. 408.

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1 Ves. jun. 46.

FETTIPLACE v. GORGES.

THE plaintiff having been, some years since, married to his late wife, by indenture, 2d and 3d August, 1772, conveyed real estates to Lord Viscount Howe and his heirs, to the use and intent that the said Lord Howe and his heirs, during the life of the plaintiff, should receive an annuity of £400 upon trust to pay one moiety thereof to the plaintiff, and should stand possessed of the other moiety thereof in trust for the sole and separate use and benefit of Sophia Charlotte Fettiplace, the plaintiff's wife, during their joint lives, and so as not to be subject to the debts, engagements, or controul of her said husband; and, to that end, that the said Lord Howe should either pay the same to her, or to such person or persons, and for such uses and purposes as she from time to time, notwithstanding her coverture, should, by writing under her hand, direct and appoint, and should permit and suffer, or authorise her, and her assigns, to receive and take the same, as she or they should think fit; and that her receipt or orders in writing should, notwithstanding her coverture, be a sufficient discharge.

Where personal property is given to a feme covert, to her sole and separate use, she may dispose of it by will without the assent of her husband.

The Hon. Juliana Page, widow, by her will dated 1st December, 1776, gave and bequeathed certain legacies to her niece, the said Sophia Charlotte Fettiplace, plaintiff's late wife, in the words following: "I leave, in trust to Lord Howe, for the sole and separate use of my niece Charlotte Fettiplace, one thousand pounds stock, and what furniture is mine at Sir Gregory Turner's, in Spring Gardens, an account of which is here inclosed;" and appointed Lord Howe executor and residuary legatee.—Lord Howe proved the will; and £1,000, 3 per cent. reduced Bank annuities were set apart to answer the legacy to plaintiff's said late wife, in the name of Lord Howe, as a trustee for her. Also, after making the said indenture, several sums of money and other property and effects were, from time to time, given to, and saved by, the said Sophia Charlotte Fettiplace, and were laid out in the purchase of £1,900, 3 per cent. consol annuities, in the name of the Hon. Caroline Howe, widow, as a trustee for the said Sophia Charlotte Fettiplace.

Sophia Charlotte Fettiplace died in May 1787, leaving her husband surviving her, but having first made a will, or testamen-

(b) Tothill, 161. George v. Chancey, 1 Chan. Rep. 8vo. 125, cited 1 Chan. Cases, 118. Gage v. Lister, 1 Brown's P. C. 112.

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tary writing, bearing date 1st July, 1782, as follows: "I, *Sophia Charlotte Fettiplace*, do leave all my personal estate, and every thing belonging to me, to my niece *Diana Frances Gorges*, of
Witness my hand, *Sophia Charlotte Fettiplace*."

And the defendant, *Diana Frances Gorges*, obtained administration, with the will annexed, to the said *Sophia Charlotte Fettiplace*.

The plaintiff filed the present bill, insisting that his late wife had no power to make such will, he never having assented to the same, or to her having such separate property; and, therefore, praying a transfer of the stock to himself.

Mr. *Mansfield* and Mr. *Graham*, for the plaintiff.—There is nothing in this case to authorize Mrs. *Fettiplace* to make a will; therefore the plaintiff is entitled as a common law right, to all the property his wife left behind her. If there be any thing to entitle her to make a will, it must be the deed, but this was no contract before marriage, or in consideration of any fortune brought by her, and they never had been separated before the deed, but were merely so in consequence of his distresses. There is not a word in the deed that implies any engagement, on the part of Mr. *Fettiplace*, that she shall have a power of disposal of what she may acquire; and it does not at all follow from such an appropriation of his property. There are *dicta* with respect to savings from pin-money, or other separate property, that the wife shall be at liberty to dispose of them, and even that she shall be preferred against the heir; but not where it is a mere provision made as this is. Then £1,000 is given to her for her sole and separate use; but from such a gift, without the assent of the husband, no power of disposal can arise. If a power of disposal makes part of the gift, and the husband suffers her to take the property, he will be bound; but it does not follow from the gift being to the sole and separate use, that he shall be deprived of any thing she might leave behind her.—Its being to her sole and separate use is so strictly confined to being so during the coverture only, that being so left during the time of a former husband, does not prevent the disposing power of a second, *Tudor v. Samyne*, 2 Vern. 270, and Sir *Edward Turner's* case there cited. With respect to real estates, it has been held, that the act of the husband (consenting to her having a power of disposal,) will not bind the heir, who cannot be bound but by a fine. *Peacock v. Monk*, 2 Ves. 190. If the Court has held that the heir shall not be bound by the act of the husband, there is no reason the husband himself should be bound by the act of a stranger.—Then, is there any thing in the gift that necessarily implies a power of disposal?—With respect to the construction of powers, it is the same with respect to a legal estate, and an use. If an ejectment was brought by the heir at law of the wife, against her devisee of land so given, it would sound very harshly,

harshly, in a court of law, that he should be bound by such a power. Then the Court will lean as much in favour of the rights of the husband as of those of the heir at law. If the dry question was whether, by such a gift to the sole and separate use a power of devising was given, the Court must, reluctantly, declare it was bound to give that construction; the words do not naturally give a power to dispose.

Lord Chancellor.—The case of *Peacock v. Monk* supposes that there may be such an agreement as will bind the heir; although where the wife makes a voluntary disposition against the heir, it cannot be carried into execution: but with respect to personal property, her disposition is good.

(c) Mr. Solicitor mentioned the case of *Wright v. Lord Cado-gan* (a), (6 Bro. P. C. 156.) where it was held, that though the will of land was not good at law, yet it was a good will in equity: and *Hearle v. Greenbank*, 1 Ves. 298, that where personal property was so given to a wife, she is considered, as to it, as a feme sole.

Lord Chancellor.—In that case, if the wife makes no disposition, the husband takes it as next of kin, not from his marital rights. All the cases shew that the personal property, where it can be enjoyed separately, must be so with all its incidents, and the *jus disponendi* is one of them (b).

Bill dismissed; costs (by consent), out of the property.

(c) Where there is a bond or agreement prior to marriage, it shall bind the heir, and the wife may make a separate disposition of realty, with the intervention of trustees. Ambler, 566.

(a) See a very full report of Lord Northington's judgment in this case from his Lordship's MSS. 2 Eden, 239.

(b) Lord Rosslyn, who appears to have been extremely anxious to protect married women from improvident dispositions of their separate property, used expressions in the case of *Milnes v. Buske*, 2 Ves. jun. 498, and made determinations in the cases of *Whistler v. Newman*, 4 Ves. 129, and *Mores v. Huish*, 5 Ves. 692, which are in opposition to the present and other previous decisions, and which, if not expressly over-ruled, have been since so repeatedly shaken as to have lost all authority. It may now be considered as settled, that wherever property has been given to the separate use of a married woman, whether accompanied by a power of appointment or not, she

may exercise her right of ownership over it without the consent of her trustees, and even in opposition to them. She may dispose of it by will (except as subject to the qualification stated in *Socket v. Wray*, post, vol. iv. 483,) or by grant of annuity out of it, or she may sell her reversionary interest in it, *Sperling v. Rochfort*, 8 Ves. 164. *Rich v. Cockell*, 9 Ves. 369. *Wagstaff v. Smith*, ib. 520. *Parkes v. White*, 11 Ves. 209. *Witts v. Dawkins*, 12 Ves. 501. *Sturgis v. Corp*, 13 Ves. 190. *Brown v. Like*, 14 Ves. 302. *Essex v. Atkyns*, ib. 542. Vide *Cluney's Equitable Rights of Married Women*, 105, et seq. Where a qualification has been annexed to the power of disposition as to the time at which that power may be exercised, vide *Pybus v. Smith*, post, 340. *Ellis v. Atkinson*, ibid. 565.

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BANCROFT v. WENTWORTH.

Plea of the stock-jobbing act, to a bill for discovery of stock transactions, over-ruled.

THE plaintiff filed his bill against the defendant, charging that the defendant had received several sums of money, enumerating them, to the amount of £5,000 and upwards, from different persons, for his, the plaintiff's use, for which the plaintiff had no voucher; and that the defendant refused to come to an account, but pretended that the plaintiff was indebted to him in a sum of £2,000 and upwards, for a stock loss in consequence of purchases and sales of stock made by order of plaintiff; charging, on the contrary, that he had never given the defendant any directions to purchase or to sell stock; praying an account, and that defendant do pay to plaintiff what shall appear to be due to him.

To this, the defendant pleaded, in bar, the act of the 7th Geo. 2. against stock-jobbing, by which it is enacted, that all contracts made for transferring stock, whereof the persons contracting are not possessed, shall be void, and the persons making such contract shall forfeit £500, and that by a discovery, he might make himself liable to the penalty in the act.

The plea being set down to be argued, was over-ruled, on the second section of the act, by which the party is bound to an answer any bill that may be filed in a court of equity (a).

(a) This determination does not appear to have been adverted to in the late case of *Bullock v. Richardson*, 11 Ves. 373, which confines the generality of this decision. Lord Eldon was there of opinion that discovery

was confined to those clauses of the act as to which it is expressly given with protection from the penalties, and therefore not extended to the 5th and 8th sections.



SEDGWICK v. WATKINS.

S. C.
1 Ves. jun. 49.
Wife's affidavit cannot be received against her husband.

BILL filed, by infants, against the administratrix of an intestate's estate, who had married again, and her second husband, for distributive shares. An application had been made for a writ of *ne exeat* against the husband of the administratrix, on the affidavit of the wife that he had possessed the personal estate of the intestate, and was going abroad.

Lord Chancellor was of opinion that he could not receive the affidavit of the wife, against her husband, especially as she was a co-defendant.

A new bill was then filed, and the wife made co-plaintiff with the infants, and on a similar affidavit of the wife, a similar application was made.

But,

But, *Lord Chancellor* said he continued of opinion that the evidence of the wife could not be received against the husband, in a case of this kind: that the only instance of the kind found in the books, was a case in which *Serjeant Puckering** had granted a writ on such an affidavit, but, on *Lord Ellesmere's* coming to the Great Seal shortly afterwards, a similar application was made to him, on the authority of that case, which he refused (a).

* Possibly his Lordship alluded to the case of *Lake v. Dean*, Toth. 158. Sir *John Puckering* was Keeper of the Great Seal from 28th May, 1592, till 6th May, 1596, when the Great Seal was delivered to Sir *Thomas Egerton* afterwards *Lord Ellesmere*: the case in which he refused the application was, probably, *Holman v. Audley*, Toth. 160.

(a) This case was cited in *De Manneville v. De Manneville*, 10 Ves. 56. *Lord Eldon* was there of opinion, that the wife's affidavit might be received not only as to personal ill-treatment, but also that upon an application to prevent a ward of court being taken out of the kingdom, the wife might

prove that the father had said he would take it. In the case of *Pory v. Powell*, cited by Mr. *Beames*, from a MS. note of Mr. *Bell* (Brief View of the Writ of *Ne exeat Regno*, 26.) his Lordship appears to have alluded to and acknowledged the authority of the present case.

DELANCY v. WALLIS.

WHERE the plaintiff at law is abroad, and an injunction bill filed, and motion that service of the subpoena upon the attorney at law shall be good service, an affidavit of the truth of the equity of the bill must accompany the motion for the subpoena, in conformity to the practice in the court of Exchequer (b).

(b) See the case of *Burke v. Vickars*, post, 21, and the Editor's note to it.

Affidavit to the equity of an injunction bill, must accompany a motion; that service of the subpoena upon the attorney-at-law should be good service.

COLMAN v. SAREL. }
SAREL v. COLMAN. }

S. C.
1 Ves. jun. 50.

GEO. DAVY, of *Tiverton*, in the county of *Devon*, attorney at law, by indenture dated 11th June, 1767, made between himself of the first part, and *Sarah Oliver* and *Joan Durnsford* of the other part, in order to make *Joan* the wife of *John Sarel*, some satisfaction for the injury and abuse which she had, most wrongfully and maliciously received from *Alice*, the wife of said *George Davy*, and to make some provision for said *John Sarel's* better support and future livelihood, and in consideration of 5s. granted, bargained, and sold to the trustees, stock to the amount of £1,000 in 3 per cent. Bank annuities, with the interest and dividends to grow due for the same, arising on the death of the said *George*

A court of equity will not carry into execution a voluntary deed, without either a valuable or meritorious consideration.

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George Davy, to hold the same in trust, in case *Joan Sarel* should outlive him, to permit her to receive the dividends during her life, for her own use, with power to dispose of the said £1,000 at her death, by deed or will, to such child or children of her's as were then living, or should be living at the time of her death, in such shares and proportions as she should think fit; and in case the said *Joan Sarel* should die in the life-time of *George Davy*, he covenanted that he would, for so long as he should live, pay the interest of the said stocks to the trustees for the benefit of *Joan Sarel's* then present children, according to such shares as she should give the said capital stock. The said indenture contained a proviso by which the grantee *Joan Sarel* was not to reside out of *Tiverton*, where *George Davy* the grantor resided.

Joan Sarel died 16th *January*, 1779, having first made her will, 29th *December*, 1775, by which she gave the said £1,000 stock to be divided among three of her children (the plaintiffs in the cross bill) to wit, £200 thereof to plaintiff *Robert Sarel*, £600 to plaintiff *Samuel Sarel*, and £200 to plaintiff *Jenny Sarel*.

George Davy died 15th *December*, 1784, having made his will, and appointed *Colman* and others (plaintiffs in the original bill) his executors.

No transfer of the stock was made by *George Davy* to the trustees in his life-time.

Two bills were filed, the first by *Colman* and others, executors of *George Davy*, to set aside the deed, as obtained by menaces and *pro turpi causâ*. The second by the children of *Joan Sarel*, for a transfer, and for the intermediate dividends between the death of *Joan Sarel* and that of *George Davy*, in the proportions given by their mother's will.

No evidence being given of any violent means used by *Joan Sarel*, for obtaining the deed, nor any ill usage of her, by the grantor, till after the deed, nor any proof of a *turpis causâ*, but the deduction to be drawn from the clause by which she was restrained from living out of *Tiverton*, the original bill was dismissed.

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In support of the cross bill,—Mr. *Mansfield* and Mr. *Grimwood* contended, that a mere voluntary contract would bind the grantor, though it would not be good against creditors; and that its being imprudent, merely, was not sufficient to set it aside; and for this they cited the cases of *Villers v. Beaumont*, 1 Vern. 100. *Boughton v. Boughton*, 1 Atk. 625. *Allen v. Arme*, 1 Vern. 365. *Williams v. Codrington*, 1 Ves. 514. in which last case, it was held by Lord *Hardwicke*, that a bill would lie for satisfaction, out of assets, of a voluntary contract. The cases which say that the Court will not enforce voluntary contracts, as the conveyance or devise of copyholds without surrender, are all against heirs at

at law. In one case, a defective conveyance was executed against the heir, *Watts v. Bullas*, 1 P. W. 60; but although this has been contradicted, and the rule has been not to effectuate such conveyances against the heir at law, it does not apply to goods or choses in action. The present subject is not, precisely, in the case of other choses in action, because it passes by transfer in the Bank books; yet it so far passes by the conveyance, as to make the executor a trustee for the assignee; and a bill would lie against the executor to compel a transfer.

Under the covenant, *Davy* was bound to pay the dividends, from the death of *Joan Sarel*, to his own trustees. Upon such a covenant, an action of debt would lie.

The *Solicitor-General* cited a case of *Goring v. Nash*, 3 Atk. 189, where *Watts v. Bullas* was declared not to be law.

But *Lord Chancellor* said, that wherever a *voluntary deed* is not sufficient to pass the subject out of the conveyer, it never can be carried into execution, without it is supported by a valuable consideration (a). The effect of this deed would be to make the conveyer himself a trustee, during his own life; and in order to raise a trust, there must be a *valuable consideration*, or, at least, what a court of equity calls a *meritorious consideration*, such as payment of debts, or making a provision for a wife or child (b).

His Lordship, therefore, dismissed the cross-bill, as far as it sought for a transfer of the stock, but left the parties to (f) bring

(f) As to action upon the covenant, see *King v. Cotton*, 2 P. W. 646. The action was brought upon the covenant, and it was pleaded to the action, that the deed was obtained by threats. Verdict against the deed.

(a) *Lord Northington*, in the case of *Wycherley v. Wycherley*, 2 Eden, 177, observed, "In general, courts will not compel the performance of voluntary agreements: an agreement in its nature imports a reciprocity and a *quid pro quo*, and where that reciprocity does not exist, the power of enforcing it does not exist. I know no instance where a court of equity has compelled a man to execute a mere act of volition;" vide also his Lordship's observations in *Hale v. Lamb*, ib. 294. So in *Lee v. Sir Robert Henley*, 1 Vern. 37, an omission in a voluntary conveyance was refused to be rectified; see also the cases cited in Mr. *Raithby's* note. The remarkable distinction noticed by Lord *Eldon* in *Ellison v. Ellison*, 6 Ves. 661, and *Pulvertoft v. Pulvertoft*, 18 Ves. 99, was taken in the present case, though it is by no means apparent from the above meagre note, viz. that if the subject in question rests in covenant,

and is purely voluntary, this Court will not execute that voluntary covenant; but if the *legal conveyance* has been effectually made, the equitable interest will be enforced. If you want the assistance of the Court to constitute you *cestuy que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestuy que trust*; but if the legal conveyance be made, that constitutes the relation between trustee and *cestuy que trust*, though voluntary, and without good or meritorious consideration; and the Court will execute it against the trustee and author of the trust. See also some observations in *Griffin v. Nanson*, 4 Ves. 344. As to voluntary settlements void under the statutes of *Elizabeth*, vide *Evelyn v. Templer*, ante, vol. ii. 148.

(b) See this passage and the concluding passage in *Bonham v. Newcomb*, 2 Vent. 365, cited in the argument of *Antrobus v. Smith*, 12 Ves. 41.

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an action on the covenant, as to the dividends between the death of Joan Sarel and that of the grantor (g) (a).

(g) This case came on for further directions, 28d June, 1792, when the jury, at the trial, having found that the deed was entered into *pro turpi causa*, the cross bill was dismissed.

(a) The decree was, that the original bill should be dismissed without costs; that the cross bill should be retained twelve months, during which time the plaintiffs in it should be at liberty to bring an action upon giving security, to be approved by a Master, to answer the costs of it; on non-compliance with these terms, the bill, at the end of the year, to stand dismissed with costs.

The plaintiffs in the cross bill did nothing till the 1st November, 1790; when they applied to have the time for bringing the action enlarged for six months, which the Lord Chancellor thought reasonable, and ordered. Upon

that order they commenced the action, without giving security for the costs.

Upon the 11th Mr. Mitford moved to amend the minutes of the last order, by inserting the terms contained in the decree; and the Lord Chancellor granted the motion, declaring he meant not to discharge the terms, when he enlarged the time, (from Mr. Vesey's report). Lord Eldon, in *Hayward v. Dinsdale*, 17 Ves. 112, alludes to the dismissal of the cross bill in speaking of the jurisdiction of the Court in ordering deeds, &c. to be delivered up; as to which, vide *Ryan v. Mackmath*, the next case.

RYAN v. MACKMATH.

A partner, after the partnership ceased, gave a joint note. Bill filed to strike out the plaintiff's (the former partner's) name, have the bill retained for a year, and a trial had; when the plaintiff at law could not prove the partnership, and was nonsuited: yet Lord Chancellor (on equity reserved) refused to decree the name to be erased.

THE plaintiff, *Philip Ryan*, and the defendant *Edward Ryan*, had been concerned together in trade as co-partners, but that partnership had ceased in the year 1774. In 1788, *Edward Ryan* gave a note, in the joint names of himself and plaintiff, to defendant *Sarah*, now the wife of the defendant *Mackmath*, as follows: "London, March 2d, 1788, four years after date, we promise to pay to Miss *Sarah Stuart*, or order, the sum of six hundred and fifty pounds, value received, *Edward and Philip Ryan*." Which note being unpaid, the defendant *Stuart* brought an action against the plaintiff, upon which he filed the present bill, charging that no co-partnership was at the time subsisting between them, and that there was no consideration for the note, but it was a contrivance between *Edward Ryan* and *Stuart* to injure him, and praying that the note might be delivered up to be cancelled; or if it should appear, that the defendant *Stuart* gave defendant *Edward Ryan* any consideration for the same, that he alone might be answerable to her for the same, and that the plaintiff's name might be erased therefrom, and the defendant restrained, by injunction, from indorsing or negotiating the said note.

Upon the cause coming on to be heard, 28th June, 1788, before Mr. Justice *Buller*, sitting for the Lord Chancellor, he ordered that the cause should stand over till the first day of causes in *Trinity* term; and that, in the mean time, the defendant *Stuart* should be at liberty

liberty to bring an action against the plaintiff and the defendant *Edward Ryan* on the note. In pursuance of the order, the defendant *Mackmath* and his wife, brought an action against the defendant *Edward Ryan* and plaintiff *Philip Ryan*, when not establishing the partnership to the satisfaction of the jury, and the action being a joint one, they were nonsuited.

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It came on again, upon the equity reserved, the first day of causes in the present term, when the *Lord Chancellor* expressing a doubt whether he could order the bill to be delivered up, or plaintiff's name to be erased, it stood over, to look into cases on the subject. And coming on again, Mr. *Solicitor-General* and Mr. *Abbott*, for the plaintiff, insisted this was a common equity upon the ground of bills *quia timet* between reversioner and tenant for life, and between surety and principal. Viner, tit. *Quia timet*; that the evidence given at law, not being sufficient to bind the plaintiff, he ought now to be secured against being harassed by future actions, or having the note negotiated into other hands, when he might no longer be able to make the same defence as he had in the present action. They cited *The Bishop of Winchester v. Fournier*, 2 Ves. 445, where the note was ordered to be left with the register, and an opportunity given to the defendant to try its validity; and the case of *Bridge v. Eddows*, there cited, where it was proved that the party said to execute was in another place: In that case the *Chancellor* ordered it to be tried, but it was not, the issue being taken *pro confesso*. Equity, therefore, ought to relieve. In principle there is no difference between this and forgery. The partnership being at an end, *Edward Ryan* had no authority to sign the plaintiff's name here; in the case where the name is really written by the party, the court has relieved, and ordered the security to be given up, as in the case of notes for gaming transactions, and marriage brokerage bonds. But in this case, the issue having been tried and found against the note, it ought to be given up. In *Whittingham v. Thornburgh*, 2 Vern. 206. a policy of insurance, obtained by fraud, was ordered to be delivered up. In *Chennel v. Churchman**, in the *Exchequer*, 1776, an

* *Chennel v. Churchman*. *Exchequer*, 22d Feb. 1776.—Bill stated, that *Edward Bickerton*, Clerk, had, in Mich. 1770, exhibited his bill in this Court against the plaintiff *Chennel*, setting forth, that as rector of *Ewhurst*, in the county of *Surry*, he was entitled (*inter alia*) to the tithes of wood and coppice-ground, and prayed the usual account.

Chennel answered this bill; but his defence becoming the common cause of the parish, *Churchman*, as the occupier of the same parish, encouraged *Chennel* to persevere in his defence, and promised to advance him money, from time to time, to support it.

Accordingly *Churchman* advanced several sums of money to *Chennel*, to the amount of £53, towards the support of the cause, for which he took three promissory notes from *Chennel*, promising that no improper use should be made of them; but *Churchman* soon afterwards put the three notes in suit against *Chennel*, and in order to restrain *Churchman* from proceeding to recover their value at law, he

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an action had been brought upon notes of hand obtained without consideration, judgment obtained, and execution issued out and executed. The Court ordered the money to be returned, and a perpetual injunction against tendering or negotiating the notes. In † *Minshaw v. Jordan*, at the *Rolls, Mich.* 1786, the bill was filed to have a note for £1,000 delivered up. It had been obtained from the plaintiff, by the defendant, for procuring the father to make a will in the plaintiff's favour, whom he was inclined to disinherit. The bill was retained, with liberty to the defendant to bring an action at law, and upon the trial the plaintiff obtained a verdict; and, upon the case being set down on the *postea*, there was a decree that the defendant should deliver up the note; and though there might have been a defence at law, Lord *Kenyon* said this Court had a concurrent jurisdiction. But, in the present case, the equity of the case is admitted, by the Court's having retained the bill. It is a necessary consequence of such retainer, that the remedy is admitted to be in equity. It would otherwise be a fraud upon the suitor; and the point has been determined in the case of *The Duke of Leeds v. New Radnor*, ante, vol. ii. p. 518.

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Mr. *Fonblanque*, for the defendant—insisted, that in this case the defence was at law, where it would be incumbent on any person bringing an action to prove the partnership. That the

he filed a bill to restrain *Churchman* from so doing, and praying that the notes in question might be delivered up to be cancelled.

The defendant answered evasively, and the plaintiff proved his case.

At the hearing, the Court declared, the notes were put in suit against good conscience, and that the plaintiff was entitled to relief against them; and decreed, that the money levied on the execution, viz. £64, should be repaid to the plaintiff; and that a perpetual injunction should issue, and that it should extend to the indorsing, or further negotiation of the notes: and, as to the head of equity, decreed the plaintiff his costs.

But, in regard to such part of the bill as sought to compel a specific performance of the agreement to reimburse, &c. the Court dismissed it with costs.

† *Minshaw v. Jordan, Rolls, Mich.* 1785.—Bill filed, to have a promissory note for £1,000, payable to defendant, or order, delivered up and cancelled, as obtained by fraud, and without consideration: the allegation being, that it was given to defendant for having procured plaintiff's father to make a will in plaintiff's favour. The bill also prayed an injunction to stay action at law, and prevent negotiation of the note.

Answer.—Admitted the facts, but insisted the note was not fraudulent, but given voluntarily for defendant's good services, and insisted upon a right to indorse and negotiate.

The decree was, "that the bill be retained till the last day of *Easter Term* next, with liberty to the defendant to proceed in his action; and in default of proceeding to trial in such action, within the time aforesaid, his Honour reserved the consideration of costs, and further directions; and any of the parties to be at liberty to apply."

Upon the trial at law, a verdict was found for the plaintiff; and the cause, in this Court, coming on, upon the equity reserved, in *Trinity Term*, 1787, his Honour (Sir *Lloyd Kenyon*) ordered and decreed, that the defendant should deliver up to the plaintiff the note in question, to be cancelled; and it was ordered, that an injunction be awarded, to restrain the defendant from proceeding at law on the said note, and the same to be perpetual; and it was further ordered, that the defendant do pay unto the plaintiff costs of this suit, &c.

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cases have all proceeded on the ground of there being no defence at law, on which circumstance the equitable relief depends. 1 Vern. 98. *Law v. Law*, Forr. 140. Lord *Talbot* said, that the bond being good at law, was the ground of relief here. He likewise referred to *Hanington v. Du Chatel*, ante, vol. i. p. 124.

Lord Chancellor said—The point turned upon the extent of the relief, and that, in order to decree the bill to be delivered up, or the name erased, he must determine, that wherever one party hath an instrument upon which he cannot maintain an action at law, he must be decreed to give it up. That the bent of his inclination was against laying down the rule to this extent; and the cases rather tended to the contrary opinion. In *Minshaw v. Jordan*, there was not only no good consideration, but there was a bad one. He thought, therefore, he could not make the decree (a).

But the defendants consenting that the name should be struck out of the note, his Lordship said, he would consider whether he should dismiss the bill with costs.

His Lordship afterwards ordered the bill to be dismissed without costs.

(a) This decision, it has been said, was much disapproved of at the time, on the ground of the instrument appearing to be void, not upon the face of it, but upon collateral circumstances, (13 Ves. 585). Where the defect in the deed appears upon the face of it, the objection which is usually made to this jurisdiction is, that the demand must be made upon the production of the instrument, and if that is produced, can never be supported. The subject has received great consideration in several cases, and particularly in *Bromley v. Holland*, 7 Ves. 3. Coop. Rep. 9, in which a decree of Lord *Alcanley*, reported 5 Ves. 610, was reversed by Lord *Eldon*. His Lordship observed, that though he did not go the length, that if it is clear that no use can be made of the instrument, that is ground enough for the equitable jurisdiction to take it out of the possession of the party, who can make no use of it beneficial to himself: but if a use might be made of it prejudicial to another, he should have an inclination to support the jurisdiction to transfer the possession from him to whom it could be of no use, to him to whom it might be useful; and in whose possession it would be prejudicial to no one. In answer to the objection, as to the defect apparent on the in-

strument, his Lordship observed, first, that the demand might be as frequently made as vexation might dispose the party to make it; and, in the next place, that where the instrument purports to affect real estate, it is not just to consider it merely having regard to the question, whether the demand can be directly founded upon it, as the instrument might in many instances defeat the ends of justice, by forming (what is called in several passages in these cases, 5 Ves. 506. 7 Ves. 21, 17 Ves. 112,) a cloud upon the title; vide, upon this subject, *Byne v. Virian*, 5 Ves. 604. *Byne v. Potter*, ib. 609. *Franco v. Bolton*, 3 Ves. 368, where Lord *Rosslyn*, upon grounds which have been disapproved of by Lord *Eldon*, 7 Ves. 19, refused to order the instrument to be delivered up. *Hewman v. Milner*, 2 Ves. jun. 483. *Duff v. Atkinson*, 8 Ves. 583. *Liste v. Liddell*, 3 Anstr. 649. *Underhill v. Horwood*, 10 Ves. 218. *Jackman v. Mitchell*, 13 Ves. 581. *Hayward v. Dimsdale*, 17 Ves. 111. See also the practice upon bills to have void policies of insurance delivered up in the Court of Exchequer, alluded to, 7 Ves. 20, 21. *Sowerby v. Warden*, 2 Cox, 268, over-ruling *Stackpoole v. Modigliani*, cit. ib.

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Where there are adult and infant legatees, whose legacies are charged on a real fund; though the adult legatees have a right to have their legacies immediately raised, and for that purpose, a sale may be necessary, and the heir offers the residue of the purchase-money to be laid out as a security for the interest of the legacies given to the infants when due, the Court will not deprive them, in case of deficiency, of recourse to the real fund.

DICKENSON v. DICKENSON.

RICHARD DICKENSON, by his will and codicils, devised his estate in *Northamptonshire*, to the defendant *John Baron Dickenson*, in fee, "Subject nevertheless, and chargeable as therein followed; that is to say, he thereby charged the same with the payment of £3,000 to the plaintiff, *Sarah French*, to be paid her within one year after his death;" and then he, in like manner, charged the same with the payment of £1,500 to the plaintiff, *Anna Maria Roberts* (an infant) and with the payment of the like sum to *Martha Ann Roberts* (also an infant) to be paid to them respectively, at their ages of 21, or days of marriage, with interest at 4 per cent. in the mean time. The testator also charged the estate, in like manner, with payment of a sum of £5,000 to the plaintiff, *Oliver Dickenson*. After the testator's death, *John Baron Dickenson* agreed with *Thomas Perkins* for sale of the estate, for the sum of £12,000; the above charges thereon amounted to £11,000, but *Perkins* refused to take the title, unless the estate was fully discharged from the several sums of money charged thereon by the will and codicils.

The bill was filed by *Oliver Dickenson*, *Sarah French*, and the two infants, *Anna Maria Roberts* and *Martha Ann Roberts*, against *John Baron Dickenson* and *Thomas Perkins*, praying that *Perkins* might perform his agreement for the purchase of the estate, and that, out of the purchase-money, *Oliver Dickenson* and *Sarah French* might be paid their respective legacies of £5,000 and £3,000, and that the several sums of £1,500 and £1,500 might be properly secured for the benefit of the infant-plaintiffs, when they should respectively become entitled thereto.

On the original hearing of the cause, his Honour referred it to the Master, to enquire and state what was the annual value of the estate, and whether it would be for the benefit of the infants, that the contract with *Perkins* should be carried into execution.

The Master, by his report, certified that the annual value of the estate was only £400, and that, as that was not sufficient to keep down the interest of the sums of money charged thereon by the testator's will and codicils, he conceived it would be for the benefit of the infants, that the contract entered into with *Perkins* should be carried into execution.

The cause coming on now for further directions, his Honour entertained some doubts how he could take from the infants the security of the real fund; for, if the money were now raised, and invested in government securities, it was very possible, that at the time when they became entitled to receive their legacies, the fund might have fallen considerably in value, and might not produce the amount of the legacies.

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It was insisted by Mr. *Mitford*, that the several charges being created by the will and codicils for the respective plaintiffs, without any priority, the plaintiffs, who were adult, had a right to have their legacies raised immediately, and that if the legacies of the adult plaintiffs could not be raised without, at the same time, raising the legacies of the infants, the consequence was, that the legacies of the infants must be raised, and they must abide the consequences; that it was evident, in this case, the adult plaintiffs could not have their legacies raised, without having the legacies of the infants raised at the same time: for, considering how nearly the sum of the several legacies approached to the sum now offered by *Perkins*, and that the price was at the rate of 30 years purchase, it would be impossible to raise £8,000 by mortgage, leaving, at the same time, a further charge of £3,000 on the estate, in the hands of the mortgagee. However, that in the present case it was not required that an appropriation should be made, by way of payment, of the infants legacies; but it was proposed that £3,700 should be invested in the public funds, as a security for the two legacies, when the infants should become entitled to them.

After some consideration, his Honour made the decree, that the contract should be carried into execution, and that the £8,000 should be paid to the legatees who were adult, upon the defendant, *John Baron Dickenson*, consenting that the £4,000, residue of the purchase money, after payment of the legacies of *Oliver Dickenson* and *Sarah French*, should be invested in government securities, to remain, together with all accumulations thereof, as a security for the payment of the legacies to the infants when they should become entitled, and undertaking to pay all parties their costs; and his Honour said, if, in the event, the fund should turn out deficient for payment of the infants legacies, they must still have recourse to the estate for the deficiency (a).

(a) Vide Sugd. Vend. & Purch. 439. 5th edit.

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VANDERZEE v. WILLIS.

BILL by the widow and executrix of *James Vanderzee* deceased, to redeem securities pledged by the testator to the house of *Moorhouse* and Co. bankers, of which the defendants are the present partners. The case was as follows: In the year 1778, the deceased kept an account with the house of *Moorhouse* and Co. as bankers; and, upon the 10th of *August* in that year, he borrowed of the then partnership £1,000 (having then £400 in the hands of the house) and gave a promissory note, and deposited several bonds and other securities as a pledge for the re-payment thereof. These securities were frequently changed by *Vanderzee*,

Bankers having securities deposited as a pledge for £1,000, though the depositor at his death is indebted in a larger sum, have no lien further than the £1,000.

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and as one was taken away, another of equal value was deposited in its room. In 1784, *Vanderzee* owing the above £1,000, and about £400 on his banking account, the partnership required an assignment of the securities, and *Vanderzee*, being an attorney, prepared a bond and deed poll for securing £1,000, although there were £400 more than due; and *Vanderzee* overdraw his account, after the execution thereof; and was, at his death in 1785, indebted to the partnership in the sum of £541, over and above the £1,000.

The bill prayed that the plaintiff might redeem, on payment of £1,000, and interest only, insisting that the deposit was made as a security for that sum only, and the rather as a larger sum was then due, and that the defendants had no lien on the securities for any further sum, and also stated that the personal and fee-simple real estate of the testator were not more, or little more than sufficient to pay his specialty debts, and that a bill had been filed by creditors against the present plaintiff and the heir at law, in which suit there had been a decree for the creditors to come in.

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The defendants insisted, by their answer, upon a right to retain the securities to the amount of their own demand, stating their practice to be never to suffer a customer to overdraw his account more than £100 without security, and that it was intended by the partnership that the assignment should cover as well the balance due, and to become due from *Vanderzee* on his cash account, as the £1,000 and interest; and that the partners always considered themselves to have a lien upon the securities for the whole debt.

Mr. *Solicitor-General* and Mr. *Ainge* for the plaintiff.—If *Vanderzee* had himself brought a bill, he would have had a right to redeem, upon payment of £1,000, with interest only. It is impossible that the bankers could, at the time they took the security, consider it as being for more than £1,000, as he was then indebted to them £400 more. Then the question is, whether the executrix has not the same right he would have had if living. She must be charged with the amount of the securities above £1,000 as assets to pay specialty debts.

Mr. *Mansfield*, Mr. *Selwyn*, and Mr. *King*, for the defendants. Whoever comes into a court of equity must do equity. If *Vanderzee* had filed a bill, he would have been told that making the security for £1,000 only, when he ought to have made it a security for all the money due, was a gross fraud upon the defendants. The defendants certainly meant to strengthen the security they had by the former deposit; for it is material that the security had been deposited seven years before; they could not mean to take a security for a less sum: this shews the plaintiff ought not to prevail in a court of equity. But, supposing this to be a security for £1,000 only,

only, the defendant would have a right to tack any simple contract debt, and the executor cannot redeem without paying the whole. *Demainbray v. Metcalf*, Pre. Ch. 419. 2 Vern. 691. 698. which was a pledge of jewels. *Coleman v. Winch*, 1 P. W. 775. If there was a bill filed by a specialty creditor, it is true he would be entitled to redeem upon paying the £1,000 only; but this is not a bill by a specialty creditor. The heir shall not redeem the mortgage debt without paying a bond debt to the same creditor. It has never been objected, in that case, that there may be a judgment creditor. This case is exactly the same, for here the chattels to be recovered will be assets to pay the simple contract debts.

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Lord Chancellor.—All the cases agree, that if the executor assigned the equity of redemption, it would put an end to the tacking: so it would if the specialty creditor brought the bill. I am afraid the rule has been laid down too broad, and that there being a decree for creditors to come in, they must redeem on payment of the £1,000 with interest (a).

(a) Sir W. Grant, in *Adams v. Claxton*, 6 Ves. 229, in citing this case appeared to have thought, that if it had been simply a case of persons making subsequent advances upon a pledge, they would have been entitled to tack; but that the circumstance of a bill having been filed by creditors made the

difference. See the cases commented upon by Lord Alvanley, in *Jones v. Smith*, 2 Ves. jun. 378. 9. For the cases upon the general doctrine of tacking securities, *Robinson v. Davison*, ante, vol. i. 63. *Lowthian v. Hassel*, post, 162.

GOATE v. FRYER.

THE defendant having brought an action at law against the plaintiff, as administratrix of her husband, she pleaded *plene administravit*, and filed a bill for an injunction to stay the plaintiff's proceeding at law, a bill having been filed here for an account, and a decree *quod computet* made the same day on which she had pleaded the plea of *plene administravit* to the defendant's action; and upon the bill filed, she obtained the common injunction, that the plaintiff at law might receive a plea, or for want of one proceed to judgment, but execution was thereby stayed.

Mr. Harvey now moved, that the injunction might be extended to stay trial, insisting that after a decree such injunction ought to go. He cited *Martin v. Martin*, 1 Ves. 211. and *Kenyon v. Worthington* (b), where there being lands descended, and a bill by creditors, in which there was a decree, other creditors bringing actions at law, the present Chancellor had ordered an injunction to stay trial, the property being in the hands of the Court.

(b) 2 Dick. 668.

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2 Cox, 201.

When there is a bill filed against an executor and decree *quod computet*, and that creditors shall come in, if a creditor brings an action, an injunction shall issue to stay trial as well as execution: but if the action be brought before the bill filed, and he chooses to discontinue, he shall be allowed to prove his costs at law, in addition to his debt.

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Mr. *Graham*, on the other side, insisted that there was no ground to extend the injunction to stay trial, as it would prevent the plaintiff at law from falsifying the plea of *plene administravit*, and, if it should be proved false, having costs personally against her.

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Lord Chancellor doubted whether the injunction ought to be extended to stay the trial. He said, that supposing this to be a bill for the discovery of that which would be an answer to the plea, it would be extraordinary that the trial should be restrained absolutely. The question was, whether it ought to be the course of the Court to stay the whole proceeding, after a decree *quod computet*, or only to stay execution.

The motion stood over, and upon a subsequent day *Lord Chancellor* said, he was convinced the injunction ought to extend to stay the trial: but as the action was commenced before the bill filed, the creditor, if he came in under the decree, and discontinued his action, should be entitled to prove his costs at law in addition to his debt: but if he chose to let his action remain till he saw what became of the fund, then the action must remain suspended.

He therefore granted the order, that the injunction should issue without the usual clause (a).

(a) See the doctrine and cases on this subject collected in the Editor's note to *Brooks v. Reynolds*, ante, vol. i. 185.

BURKE v. VICKARS.

Affidavit of the merits must accompany motion for an injunction to stay proceedings, where plaintiff at law is abroad; but need not accompany the application that service of the subpoena upon the attorney may be good service.

MR. *Stanley* moved, that service of the subpoena, in an injunction bill, upon the attorney at law, should be good service, the plaintiff at law being abroad; upon an affidavit that the attorney had been applied to, and had refused to accept the subpoena, but there was no affidavit of the truth of the equity of the bill.

Lord Chancellor said, he had thought of this matter, and although, if the practice were to settle a-new, he should think it were better that the affidavit of merits should be made in the first step of the cause; yet as, if the attorney does not appear, nothing can be done, he thought it was sufficient that the affidavit of merits should accompany the motion for the injunction (b).

(b) This (which is said to be the present practice in the Court of Exchequer) has been since varied, and the rule is established, as in *Delancy v. Wallis*, ante, 12. *Stephen v. Cini*, 4 Ves. 359. *Fullarton v. Wallace*, ib. 360. n. *Anderson*

Anderson v. Darcy, 18 Ves. 447. *White v. Klevens*, ib. 471. It is not necessary that the affidavit should state the previous refusal by the attorney to accept the subpoena, *French v. Roe*, 13 Ves. 593. Lord Redesdale, in *Smith v. The Hibernian Mine Company*, 1 Sch. & Lef. 239. observed, that the case of executors living abroad, and giving a letter

of attorney to a person to prove the will, in which service on that person has been held good (as in *Hales v. Sutton*, 1 Dick. 26.) seems to be of the same description as the present. For the cases in which service on clerks in court, or agents, has been held not to be good service, vide *Bond v. The Duke of Newcastle*, post, 386.

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A BOND had been given by the defendant to *Saunderson*, and by him assigned to plaintiff; *Saunderson* was since dead, and nobody had administered to him.

Ne exeat regno refused at suit of assignee of a bond, the original obligee being dead without representatives.

Mr. *Richards* moved, on the part of the plaintiff, for a *ne exeat regno* against the defendant, on an affidavit that he was going abroad, and in order to give the plaintiff time to obtain administration to *Saunderson*.

Lord Chancellor refused to order the writ to issue; because the suit, without a representative of the original obligee in the note, must be dismissed for want of parties (a).

(a) Vide Mr. *Beames's* Brief View of the Writ *Ne exeat Regno*, 56. *Storey v. Higgins*, post, 476; and for the

general doctrine, *Atkinson v. Leonard*, post, 218.

JOLLIFFE v. EAST and Others.

JANE JOLLIFFE, deceased, by a memorandum signed by her April 10, 1775, left to her brother *William Jolliffe's* two eldest daughters, *Eleanor* and *Sophia Jolliffe*, the sum of £10,000, to be equally divided between them when they should arrive at the age of twenty-one years, and that sum to carry interest for them from the time of her the said testatrix's death, until they should arrive at the above age; and begged the plaintiff *Thomas Jolliffe* would execute the said memorandum as her last request. The testatrix died on the said 10th of April, 1775, and the plaintiff proved the memorandum in the ecclesiastical court.

Legacy of £10,000 to two sisters to be equally divided when they should arrive at twenty-one, is a tenancy in common, and one dying under twenty-one, her share shall go to her representative.

The said *Sophia Jolliffe* (one of the legatees) died 8th April, 1784, without having attained her age of twenty-one years, inter-

When a testator expresses himself so ambiguously as to make it necessary to come to this court, the costs shall be paid out of his general assets.

tary to come to this court, the costs shall be paid out of

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tate, and her father (the defendant *William Jolliffe*) took out administration to her, and the plaintiff, apprehending that each of the legatees had a vested interest in a moiety of the said legacy, and the defendant *William Jolliffe* having so insisted, and that he, as administrator to *Sophia*, was entitled to her moiety, the plaintiff paid the sum of £5,000 to the said defendant, with interest from the death of the testatrix. *Eleanor*, the other daughter, intermarried the 3d May, 1788, with the defendant *East*, and has not attained her age of twenty-one years, and her £5,000 was made a subject of settlement on that marriage. The bill suggested that *East* and *Eleanor* his wife, and the trustees in their settlement, insisted that *Eleanor* and *Sophia* were joint-tenants of the legacy of £10,000, and that by the death of *Sophia*, she, *Eleanor*, was become entitled to the whole. The plaintiff's bill therefore prayed that it might be declared, whether *Eleanor* was entitled to the whole, or only to £5,000, and proper accounts might be taken, offering to pay the £5,000, and interest, and that if the Court should be of opinion that *Eleanor* was entitled to the whole, the defendant *William* might pay the £5,000, and interest paid to him, or repay the same to plaintiff.

Mr. Solicitor-General, for the defendants *East* and his wife, contended that this was a joint-tenancy till twenty-one, though divisible then, and that *Eleanor* was entitled to the whole.

The memorandum is, to the two eldest daughters *Eleanor* and *Sophia* £10,000. Had it stopped here, it would clearly have been a joint-tenancy. In *Perkins v. Baynton*, (ante, vol. i. p. 118.) it is said, "That residuary legatees, not being executors, will always take as tenants in common; though executors will take as joint-tenants." But the authorities seem doubtful as to this: in *Webster v. Webster*, 2 P. W. 347. one having devised the residue of his personal estate to three persons, it was held by the Court to create a joint-tenancy. That was decided in 1726.—In 1729, *Cray v. Willis*, 2 P. W. 529. was decided, and it was there also held, that the residuary legatees were joint-tenants; though it is true that they were, in that case, also executors. In *Cray v. Willis*, it is said that the leading authority on this subject is *Lady Shore v. Billingsby*, 1 Vern. 482. and Sir Thomas Jones, 162. S. C. where it was held that a surplus of a personal estate devised to A. and B. was a joint devise, and should survive; and that case is called the last authority on the subject, which is a singular circumstance, as *Webster v. Webster* was so late. As to *Webster v. Webster*, no decree is to be found in the Register's book, nor is there any minute to be found in the Register's minute-book. The case of *Lady Shore v. Billingsby* is differently reported in Vernon and in Sir Thomas Jones; but upon examining the Register's book, it appears that the report in Vernon is the most correct (i).

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(i) Vide 3 Vern. 632, where this case is said to be correct.

It does not, indeed, there appear, whether the residuary legatees were or were not executors; but upon searching the original will in *Doctors Commons*, it appears that one of the residuary legatees was executor, the other not. Therefore, on the authorities, it appears that the first clause of the bequest, in this case, would make them joint-tenants. Then the question is, whether the words "equally to be divided between them when they shall arrive at the age of twenty-one years," shall make any difference. We insist the meaning of the will was, that if they lived to attain twenty-one, the fund should be divided; till then they had it jointly, and therefore *Sophia* having died under twenty-one, *Eleanor* took the whole.

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Then, as to the clause relative to the interest, that is joint, and confirms the construction. The Court might have applied the interest for maintenance, during infancy, in different shares, according to the exigencies of the infants at different ages, there being nothing in the will to controul it.

Lord Chancellor, (without hearing the other side)—I believe it is very well understood that the Court decrees a tenancy in common as much as it can. If, indeed, there are no words that will point at a tenancy in common, the rule of survivorship must take place. But I think it pretty clear that the words in this will are sufficient to create a tenancy in common (a). As to the costs of the suit, wherever a testator has expressed himself so ambiguously as to make it necessary to come into this Court, his general assets must bear the costs. His Lordship likewise declared, that *Eleanor* and *Sophia* were entitled as tenants in common, and the costs of the suit should be paid out of the assets.

(a) For the cases upon this subject, vide the Editor's note to *Perkins v. Bepton*, ante, vol. i. 118.

DORAN v. ROSS.

S. C.

1 Ves. jnn. 57.

Lincoln's-Inn
Hall, Dec. 4.

IN the marriage-settlement of the plaintiff with *Ann Doncastle*, there was a life-estate in £320 a year annuities, given to the husband for life; and there was a provision made of £500 in case of the death of the wife without children, for her nephew; but it was so expressed as to stand doubtful whether, in that event, the whole did not go over to the nephew. It was a question of construction, whether the word *her* should not be construed *his*.

The expression of a deed cannot be varied without some recital to justify the construction.

Lord Chancellor refused *parol evidence* to explain the intention of the deed, and then said, that if there was any recital to which the expression in the deed was contrary, he should consider which were the means to come at it; but that, without some such guide, he

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he could not change the words of the settlement. That there was no authority on which he could do that (a).

(a) See, upon this subject, the cases cited in the note to *Broadmead v. Wood*, ante, vol. i. 77. and particularly the very able judgment of Lord Northing-

ton, in the case of the *Earl of Northumberland v. Earl of Egremont*, 1 Eden, 435. from his Lordship's MSS.

S. C.
1 Ves. jun. 63.
Lincoln's-Inn
Hall, Dec. 7,
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Where the residue is given to a person who dies in the life of the testator, by which the gift is lapsed; still the executors, though they have no legacies, are trustees for the next of kin.

BENNET v. BATCHELOR.

FRANCIS HAMLIN made his will 6th Oct. 1770, whereby, after several devises and bequests, he gave as follows: "Also I give and bequeath unto the above named *Jenny Powel* (to whom he had before devised real estates, and also had given specific bequests) *all* my household goods, books, linen, wearing apparel, and all other, not before bequeathed, goods and chattels that I shall be in possession of at the day of my decease, (except the plate and legacies before and hereafter given and bequeathed:) Also I give and bequeath unto the said *Jenny Powel* all monies that shall be due to me from my tenants, or other persons, at the time of my decease, that she may be enabled to pay all my just debts, dues, and demands whatsoever, due from me to any person or persons at the time of my decease." He gave to *Francis Warden*, *William Beard*, and *Walter Batchelor*, ten pounds a-piece for mourning, and appointed *Francis Warden*, *Walter Batchelor*, *Jenny Powel*, *Thomas Martin*, and *John Allen*, executors, and charged the said *Jenny Powel* with the payment of all his debts, legacies, and funeral expences. *Jenny Powel* died in the life-time of the testator, by which the bequest to her lapsed; and the next of kin of the testator filed this bill against the defendants, the executors, for the residue; insisting that the residue having been given, they were executors in trust only.

Mr. *Solicitor-General*, for the plaintiff, insisted, that wherever the residue is given away, though the party to whom it is given dies in the life-time of the testator, it excludes the executor from taking the residue: for this position he cited *The Bishop of Cloyne v. Young*, 2 Ves. 91.

He was stopped by the *Lord Chancellor*, who desired to hear the other side.

Mr. *Mitford*, for the defendants, contended—1st. that the bequest to *Jenny Powel* was a specific, not a residuary bequest: it is a gift of household goods, books, linen, wearing apparel, and other unbequeathed goods and chattels. This must be confined to goods and chattels *ejusdem generis*, and is not a general disposition of personal property; it would not pass leasehold estates, horses,

horses, carriages, or money in the public funds. He has afterwards given particular sums of money to be paid by his executors, and has also particularly given debts due to him, which shews he did not conceive they would pass by the general clause.

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Lord Chancellor.—He might not know that debts would pass by the words *goods and chattels*, and was therefore desirous of giving particularly what did not appear, to a common understanding, to pass. If *Jenny Powel* was alive, there could not be a doubt of this passing the property as a residuary clause.

Mr. Mitford.—The gift of a sum of money for mourning, has been held not to deprive the executor of a right to the residue, *Buffar v. Bradford*, 2 Atk. 220. but if it did, here are two executors who have no legacies. The executors are, therefore, under the determinations, entitled to the residue. It has been held, that though a particular residue is given away, yet if it lapses by the party dying in the life of the testator, the executors shall take, *Wilson v. Ivat*, 2 Ves. 166. which is somewhat differently stated in the Register's book from the report of it; *Norman*, by will, gave to *Ann Wilson*, his god-daughter, a copyhold estate; and he gave to his wife his household goods, stock of cattle, monies, and securities for money, debts, &c. and appointed her and the defendant executors: the wife died during his life, and the plaintiffs filed their bill as next of kin: the bill, as far as it sought an account and distribution of the personal estate, was dismissed with costs. The cases are in some degree contradictory, but in general support this decision. *Hunt v. Berkeley*, 1 Eq. Abr. 243, but better reported in Mosely, 47, was in favour of the executors; and though that case was disapproved by Lord Hardwicke, in *Owen v. Owen*, 1 Atk. 494. yet he there determined on the ground that the nieces were to take as tenants in common. In *The Bishop of Cloyne v. Young*, 2 Ves. 91. there was a residuary clause, though no name of the legatee; and Lord Hardwicke thought, from the circumstances, the executors were not entitled; he cited *Holderness v. Reyner*. In *Dawson v. Dalton*, 11th Feb. 1752, J. Brice gave the residue to his three sons, whom he had made executors: one of them, *Nicholas*, died; the next of kin claimed: Lord Chancellor doubted whether it was settled, when the residue was given, by a residuary clause, to persons as tenants in common, and not as executors. In *Man v. Man*, 2 Stra. 903. the residue was given in shares; two of these shares lapsed, and they were taken by the wife as executrix. In *Page v. Page*, 2 P. W. 489, it was decided that the sixth part of the residue which lapsed, should go to the next of kin; but that was because the residue was given to them all as a residuary clause; and they were to take nothing as executors. *Owen v. Owen*, 1 Atk. 494. was decided on the same reasoning.

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Lord Chancellor.—I take it to be clear, that though executors take beneficially as well as nominally, where there is nothing in the will to the contrary; yet, if, there is any thing to shew *an intent that they were intended as trustees*, it will make them so. And wherever the testator has, by the same instrument by which he appoints them executors, *given every thing away from them to a stranger*, that must shew he meant them only to take as trustees. Here he meant *Jenny Powel* to take beneficially; and if she had come to claim, there could have been no doubt (a).

Decree for Plaintiff.

(a) For the cases upon this subject, vide the Editor's note to *Bowker v. Hunter*, ante, vol. i. 328. where most of them are collected. Vide also the case

of *Hill v. Smith*, 1 Swanst. 197. which has been printed since that note went to press.

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Lincoln's-Inn
Hall, 9th, 10th
December.

CROSS v. HUDSON.

A person having a power, by marriage articles, to charge an estate of which he was a tenant for life, with intermediate remainders, with a contingent fee to himself, executes the power by will; the contingent fee afterwards comes to him: though, by the accession of the fee, the power is gone; yet the provision made by the will shall be served out of his estate in fee, being considered as an interest, enabling him to charge the estate.

BY indentures of lease and release, 9th and 10th Feb. 1769, made between *Catherine Wild*, of the 1st part, *John Hay*, of the 2d part, and *Richard Hay* and *Lionel Lee*, of the 3d part, reciting an intended marriage between the said *John Hay* and *Catherine Wild*, the said *Catherine Wild* conveyed her undivided moiety of the premises therein mentioned, to *Richard Hay* and *Lionel Lee*, and their heirs, to the use of *John Hay* for life, remainder to the use of *Catherine* for life, remainder to *Richard Hay* and *Lionel Lee*, to preserve, &c. remainder to the use of all the children of the marriage, in such shares as *John Hay* and *Catherine Wild* should appoint; in default of appointment, to all the children of the marriage equally in tail; remainder to the use of the survivor of the said *John Hay* and *Catherine Wild*, and the heirs and assigns of such survivor.—In the said indenture was the following proviso, “that it should and might be lawful for the said *John Hay*, by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of, and attested by two or more credible witnesses, or by his last will and testament in writing, to be signed by him in the presence of, and attested by three or more credible witnesses, to grant, limit, and appoint unto any person or persons, either for his, her, or their life or lives, or for any greater estate or estates, any rent or rents, annual sum or sums, not exceeding in the whole the yearly rent or annual sum of £100, tax free, and without any deduction, to be issuing out of, and chargeable upon the said moiety, or half-part of and in the said messuages, lands, tenements, or any of them, and to be paid at such days and times, and with such powers and remedies for recovering such rent or rents, or annual sum or sums, when in arrear,

arrears, as to the said *John Hay* should seem meet; so that such rent or rents, or annual sum or sums to be so granted, limited, or appointed as aforesaid, or any of them, should not commence or take place during his life."

The marriage took effect, and *John Hay*, in the life-time of *Catherine*, but there being no issue of the marriage, made his will, dated 24th *May*, 1775, which was published in the presence of three witnesses, and thereby (after taking notice of the said indenture) he did, by virtue, and in pursuance and execution of the power to him reserved, and by virtue of all other powers and authorities vested in him, grant, limit and appoint, from and immediately after his decease, unto the defendant *Thomas Fulling*, his heirs and assigns for ever, one rent or annual sum of £100, free from deductions, to be issued out of, and chargeable upon the premises by the said deed of settlement conveyed, and to be payable out of the same, half-yearly, at *Lady-day* and *Michaelmas* in every year, the first half-yearly payment to be made on such of these days as should first happen after his decease, with the usual powers of distress in case of non-payment: and the said *John Hay* declared that the same was granted, limited, and appointed to the said *Thomas Fulling*, upon various trusts which never took effect, and afterwards upon trust that the said *Thomas Fulling* should sell and dispose of the said annual sum; and, in the first place pay thereout to his niece *E. M. Cross*, £100, and the residue of the monies arising by such sale, among the children of his brother *Richard Hay*, or such one or more of them as his brother *Richard* should appoint; in default of appointment, among such of them as should be living at the death of the said *Richard Hay*, equally.

Catherine Hay afterwards died in the life-time of the said *John Hay* without issue; so that the remainder in fee became vested in *John Hay*.

John Hay died in *November* 1781, leaving the will which he had before made unaltered and unrevoked, and leaving *Richard Hay* his brother and heir at law.

Richard Hay died, having made his will, which contained nothing material to the question in this cause, leaving four children, of whom *R. J. Hay* was his eldest son and heir at law.

A bill was filed by the younger children of *Richard Hay* against *R. J. Hay*, and the trustees of *John Hay's* will, praying, amongst other things, that the will of *John Hay* might be established, as far as the same related to the disposal of the said annuity of £100, and that the said annuity might be sold, and the monies to arise by the sale applied according to the directions of the will of the said *John Hay*.

The defendants put in their answer; and *R. J. Hay*, by his answer, insisted that the plaintiff's annuity was not a subsisting charge upon the estate contained in the settlement; inasmuch as the

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the said *John Hay*, before his death, became entitled to an estate in fee-simple in the estate comprised in the said settlement; and that becoming so seised, the power given to him by the settlement became merged in the fee simple.

The cause came on now to be heard.

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Mr. *Mansfield*, Mr. *Mitford*, and Mr. *Campbell*, for the plaintiffs, made two questions:

1st. Whether the power was well executed, or it was extinguished by the accession of the fee.

2d. Whether the provision should be made good out of the fee.

As to the first, this is not the case of a power merged in a greater estate, from the estates being inconsistent with each other; the power being, in this case, distinct from the estate for life, which he took under the settlement, and will subsist unless some act has happened which the law says ought to destroy it. The doctrine of merger is little favoured at law, but much less in this Court, and the power being *in gross* and collateral to the estate, does not fall within any of the cases of merger by the accession of a greater estate. Where the remainder in fee arises from the same instrument as the power, it is never said to merge the power, and although the estate for life might merge in the fee, for other purposes, the power would not be extinguished. *Powel v. Morgan*, 2 Vern. 90. *Thomas v. Keymish*, *ibid.* 348. *Duke of Chandos v. Talbot*, 2 P. W. 601. 604.

But, suppose the power to be extinguished, the provision must be served out of the interest *J. Hay* had in the estate. The Court will not suffer the provision to fail though it does not arise out of the fund he meant it to arise from. *Sir Edward Clere's case*, 6 Rep. 18 a.

Mr. *Solicitor-General*, for the defendants, insisted—that the contingent estate having, in this case fallen in, and no act having been done by the testator afterwards, the power is not well executed. All the cases are of persons who, though they could dispose of the charge, yet, being infants, cannot dispose of the estates. That the intention of the party here being to execute his power by charging the wife surviving, or the issue of the marriage, and not to give any thing out of the estate itself, it could not be extended to the case of there being no issue, and himself surviving; nor did it follow that because he meant to make a charge in that way, he would have made the same charge out of his own estate. It is true, that if he had stated the case, and said, that out of the power, or the contingent fee, he made the provision, it must have been allowed to be good, since the case of *Perry v. Jones*, 3 T. R. 88. though, before that case, Mr. *Fearne* thought such an interest was not devisable. If, therefore, it is made out that he

meant

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meant to execute it as a power, and that he did not mean to give it as an interest, it will not be an exception to the rule, that when the power is extinguished by the accession of the fee, the provision fails: it has never been held that a power was well executed where the party had a reversion, after intermediate interests, where that power is collateral to the estate; and wherever the estate to be raised by the power is not to commence till after the estate in the person having it, such power is collateral and will not pass by *totum statum suum*. If the power be executed by deed, and the commencement of the estate be immediate, it may be good, because then, by possibility, there might be an interest which would last as long in the party having the power, as the estate to be created by it. Thus in *Edwards v. Slater*, Hard. 410. where Lord *Hale*, in his argument, assimilates other powers to those of leasing, the effect of his reasoning is, that the rent is not gone at the death of a man, because, by possibility, his estate for life may last as long as the lease. Here, the reversion falling in destroys the power; because the whole estate comes to the same person, and there is no possibility that the intermediate estates should last as long as that to arise from the power.

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Mr. *Graham*, on the same side.—Under the circumstances of this case, the power is gone by the accession of the fee; and the words cannot have such an effect as to raise an estate out of the testator's interest. As to the first, it is clearly within the cases of merger: where *the rights are different*, it is true it is no merger, as the case of a feoffment by a lord to a copyholder, to the use of another; or to a tenant to the precipe to suffer a recovery; these are not mergers: but wherever a less estate and a larger coincide in the same person, a merger takes place; as an estate *pour autre vie* will merge in an estate for the parties own life, and a base fee in an absolute fee.—To apply this—In the case cited from Hardres, Lord *Hale* seems to think such a power as this a power in gross; if to be so considered, it is not more favourable to the plaintiff; but it is a power coupled with an interest, as he might have conveyed it to his own family, or for payment of his own debts. In *Hearle v. Greenbank*, 1 Ves. 298. such a power is considered as coupled with an interest. In late cases, such powers have been literally construed. In *Zouch v. Woolston*, 2 Burr. 1136, Lord *Mansfield* gives his idea of powers coupled with interests. In this case it was the estate of the wife, who gives to the husband a power which is a mode of property or interest in the land; the same person cannot have a partial ownership, and an absolute dominion, the interest being of the same kind, and only inferior in degree. It was competent to him, at his death, to appoint the whole estate; therefore he could not exercise a partial power over it.

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Lord Chancellor.—If any serious doubts remained in any party in this case, I would take time to look more particularly into the cases: but it seems to me that the disposition made by the testator in this case, *must take effect out of his interest*, though the power is gone.

I think, with the defendants, that the power is merged: but I am also of opinion, that though the power was gone, and the will made by him purported to be an execution of the power, yet as he evidently meant that the charge should take place on the estate at all events, it must be sustained *as a charge* on the estate out of the interest he had at his death. This case is not at all like *Tomlinson v. Dighton*, 1 P. W. 149. there the question was, whether a conveyance, as by the owner of the estate, should operate as an execution of the power which the wife clearly had, but no ownership; and it was held it should. Here the will refers to the power, and though it goes on with some words more general, as to “all powers and authorities enabling me thereto,” yet, to be sure, technically speaking, the power does not apply to the sort of interest which ownership gives. But the testator, in this case, has charged the estate with a burthen which his interest enabled him to lay on the estate, though his power, properly speaking, was gone. When I speak of his power, I mean at the time of his death, for that is the period at which the will speaks. And therefore, it is the case of a man *having no power, but having an interest enabling him to charge the estate*, and charging it in the shape of an execution of a power notwithstanding: now I never heard it as a point to be maintained, that because a man shews an intention to execute a power which he has not, the interest which he had in the estate should not bear out the disposition he thinks proper to make of a charge on that estate. Therefore, though the power in this case were merged, which I take it to have been, yet the devise must take effect out of his interest (a).

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(a) The question, whether, where an estate is limited to such uses as a person shall appoint, and in default of appointment to himself in fee, the power was not merged in the fee, has been lately much discussed: and it appears, from Mr. Sugden's very able observations upon this subject (*Powers*, 79, et seq.) that till the late case of *Goodhill v. Brigham*, 2 Bos. & Pull. 192. there were no authorities except the present case, and an opinion of Lord Ashburton; that the separate existence of the power of appointment was incompatible with the ownership of the fee. In *Goodhill v. Brigham*, the Court of Common Pleas came to that conclusion; which was followed by Sir W. Grant, in *Maundrell v. Maundrell*, 7 Ves. 567. (where, however, the point was not fully discussed): And the

Court of King's Bench, in *Roach v. Garvan*, 6 East, 289. having been erroneously informed that the point had been so settled by the House of Lords, adopted the doctrine. Lord Alvanley, on the other hand, in *Cox v. Chamberlain*, 4 Ves. 637. expressed a strong intimation of dissent from *Goodhill v. Brigham*; and Lord Eldon, when the case of *Maundrell v. Maundrell* came on before him, on appeal from the decision of Sir W. Grant, entered at large into the subject, to show that the power was not merged in the fee. His Lordship's reasoning is so luminous, satisfactory, and convincing, that the point may now be considered as established by the highest authority and completely set at rest.

The present case, as observed by Mr. Sugden, is distinguishable from *Maundrell*

Maudrell v. Maudrell, inasmuch as in that case the donee of the power acquired the estate, immediately on the execution of the deed creating the power, so that unless the power had been upheld it would have been void in its creation: whereas, in the present case, the donee had not any estate at the execution of the deed, in which the power could be absorbed; and, consequently, the decision, that the power was merged by the accession of

the fee, did not wholly strike the power out of the deed creating it, as from its execution, for the power subsisted until the happening of the contingency, which cast the fee itself on the donee. Mr. Sugden, however, has clearly shewn, that the principle of the decision has been over-ruled by *Maudrell v. Maudrell*. The whole of that gentleman's observations on this point are worthy of the greatest attention.

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Cross

v.

Hudson.

DUNGEY v. ANGOVE and Others.

THIS was a bill of interpleader filed by a tenant against persons who claimed the premises under different rights, offering, as usual, to bring the money into Court to abide the event; and an injunction had been obtained till the coming in of the answer.

Mr. Simeon had moved that the bill should be dismissed, the money not having been paid into Court, agreeable to the offer contained in the bill.

Mr. Hollist objected, that the motion was premature, no notice having been given to pay in the money; that the first motion ought to be for payment of the money, and upon non-payment, they might move to dismiss.

Lord Chancellor thought that the motion for dismissal was well founded, on the non-payment of the money; and that the injunction, for want of an answer, ought not to have been granted without the plaintiff's bringing the money into Court. It stood over, and notice was given of motion to dismiss the injunction on the merits.

Mr. Hollist, in support of the injunction, and against the order of dismissal, cited two cases—

Brimer v. Buchannon, 28th November 1780, where, in a bill of interpleader, the defendant being in *America*, and an injunction being obtained for want of an answer, the same was continued on bringing the money into Court.

In *Surry v. Waltham*, 28th February 1785, the injunction was continued to the hearing, on the plaintiff's paying the rent due into Court, and paying future rents within six weeks after they accrued.

Lord Chancellor said, his opinion was, that the money ought to be paid in, in the first instance; because the gist of the suit is, that

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Lincoln's-Inn,
Hall, 12th Dec.

Upon an interpleading bill, *quere* whether the money ought not to be actually brought into court before the motion for an injunction; though the practice seems to have been, that it has been held time enough if brought in upon shewing cause against the motion to dissolve the injunction.

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the plaintiff is a stake holder, that he has the money and wants to get rid of it. In the first case cited, of the man in *America*, nothing can be harder than that the plaintiff should prevent his proceeding, without bringing the money into Court, which he admits to be due from him. It is laid down distinctly, both in the *Practical Register*, p. 39. and in *Equity Abr. tit. Interpleader*, that no step can be taken till the money is paid into Court.

It stood over again till this day, when *Lord Chancellor* said, that in a pure interpleading bill, the plaintiff never can proceed compulsorily by injunction, till he has brought the money into Court.

But the defendant waiving this motion to dismiss the bill, the injunction was continued, (by consent) (a) on the plaintiff bringing into Court the year's rent due at *Christmas*, 1788, and the three quarters due at *Michaelmas* last, it being admitted that the reservation of rent was quarterly), and also all the costs at law, both of the replevin and action of covenant, and undertaking to pay the future rents within six weeks after each rent day.

(a) When this cause afterwards came on upon the hearing, 2 Ves. jun. 306. 311, *Lord Rosslyn* observed, that he did not blame the defendant for thus consenting: as perhaps his prudence suggested, that if he was to get rid of the bill, and endeavour to recover the rent by distress, it might be very doubtful. The whole transaction appeared to be so grossly collusive, that the bill was dismissed with costs to the landlord, as between attorney and client, to be paid by the plaintiff and his solicitor; the latter to shew cause why he should not be struck off the Rolls. It was there laid

down, that a tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger under a title adverse to that of the landlord. Such a bill, however, may be maintained where the landlord has by his act given a colour of title to another person, *Cowtan v. Williams*, 9 Ves. 107. *Clarke v. Byne*, 13 Ves. 385. *The East India Company v. Edwards*, 18 Ves. 378. For more upon the subject of interpleader vide *Aldrich v. Thompson*, ante, vol. ii. 149. *The Duke of Bolton v. Williams*, post, vol. iv. 297.

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S. C.

1 Ves. jun. 78.

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The money raised by the sale of timber cut by tenant for life impeachable, &c. ordered to be paid to the next taker of the inheritance, though there were intermediate remainders that might arise.

Such tenant cutting timber will lead to an account, but where no more timber has been cut than charged by the bill, and admitted by the answer, the money shall be paid without costs.

LEE v. ALSTON.

THIS cause, reported ante, vol. i. p. 194. came on again upon the Master's report.

The Master reported that the timber cut had sold for £665.

And the question was, whether *Mrs. Lee*, as entitled to the inheritance in tail, though with intermediate remainders which might arise, was entitled to the money.

Mr. Mansfield and *Mr. Lloyd* insisted,—that under the cases of *Udall v. Udall*, Aleyn 81. and *Bewick v. Whitfield*, 3 P. W. 267.

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it had been always held that the first taker of the inheritance was entitled to timber fallen by storm, or by the act of the party. That in *Garth v. Cotton*, 3 Atk. 751. it was held otherwise on account of the collusion; and in *Williams v. Duke of Bolton*, (stated in Mr. Cox's note on 3 P. W. 268.) it was on account of the Duke himself, who cut the timber, being entitled to the inheritance. In this case, Sir Rowland Alston had no right to lay out the money upon the inclosure, he ought to have charged the estate agreeable to the act of parliament.

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Mr. Solicitor-General and Mr. Selwyn, for Sir Rowland Alston, principally argued that this was not a case for costs; the Master not having found any timber cut but what was stated in the bill, and admitted by the answer.

Lord Chancellor said he continued of the opinion he was of, that if a party cuts timber on an estate on which he is not entitled so to do, it will draw an account: that he must suffer himself to be considered as the bailiff of the remainder-man; on the other hand, the remainder-man must take the money he got for it; whereas, in an action, he might have the real value of the timber.

He admitted that the case of *Bewick v. Whitfield*, had settled the law on the point of timber fallen by tempest, &c. and ordered the money to be paid to the plaintiff, but without costs (a).

(a) In conformity with the determination in this case, ante, vol. i. 194, it was held, in the case of *Gower v. Eyre*, Coop. Ch. Rep. 156, that the

tenant for life, entitled to timber for repairs, could not sell the same to reimburse himself for expences incurred in repairs.



WILLIAMS v. FARRINGTON.

BILL by the husband of the *Coote East Indiaman*, on the part of the owners, against the captain, praying an account of goods put on board by him or for his account, in the course of the outward and homeward bound voyage, beyond his privilege allowed by the company; in order to ascertain freight due to the owners.

An answer had been put in, to which exceptions had been taken. The defendant submitted, and put in a further answer, except as to so much as interrogated with respect to the cargo put on board the vessel beyond her privilege, insisting he was not bound to answer as to that, as it would subject him to penalties both to the king and the company, but not setting forth the penalties or the statutes inflicting them.

covering, the exceptions shall be allowed, and the party is bound to discover.

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If a bill be for discovery of matters penal at common law, or by statute, the defendant need not demur or plead, but it will be admitted on exceptions; but when the time for suing a penalty expires between the first and second answers, and exception is taken to the second answer for not dis-

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FARRINGTON.

At the time of putting in the first answer, the time limited for suing the penalties to the crown was not elapsed, but it was at the time of the second answer put in; and exceptions having been taken to the second answer, the Master reported it sufficient; exceptions were taken to the Master's report, which came on now.

Mr. *Attorney-General* and Mr. *Abbot* contended—that the answer, in this case, was not sufficient. That even in the cases where a defendant may plead or demur, if he chooses to answer, he must put in a full answer. Here he refuses to set forth what cargoes he put on board, lest he should be liable to penalties; but he does not state what the penalties are, whether they are by statute, or only by contract, which is not sufficient; as, in order to afford the excuse, they must be penalties by operation of law. In *Honeywood v. Selwin*, 3 Atk. 276. some specific penalties were pointed out.

2dly. The limitation of the penalty, though it had not expired at the end of the first answer, had at the time of the second; so that the defendant was not then liable to any penalty upon making the discovery.

Mr. *Solicitor-General*, for the defendant—said he had always understood that where a party submitted to exceptions, he was not supposed to submit to all that were taken, but that he only put in an answer to such of them, as, with his former answer, made a full answer.

The second answer having reference to the first, and making with it one answer, if he was not liable at the time the first was put in, to answer a particular interrogatory in the bill, he could not become so afterwards. And the Master, in this case, has reported the answer sufficient to a common intent.

The bill here is by the husband of the ship, on behalf of the owners, and claims on their behalf freight upon the captain's investments beyond his privilege; which it cannot be necessary for the defendant to answer, because the freight cannot be due to the plaintiff or the owners, the whole ship being freighted to the company. The captain is, therefore, only liable to the company, to whom the captains enter into very heavy securities not to exceed their privilege. The bill is, therefore, merely to render the defendant liable to these penalties. In order to be supported, a bill ought to shew that the plaintiffs have an interest in the subject.

Mr. *Mitford*, as *amicus curiæ*, mentioned a case of *Mason v. Murray*, which was a bill for an account of the sale of a book, the defendant having demurred on account of penalties, the bill was amended, waving the penalties; but the defendant insisted he still

still was not liable, as the king's share could not be waved; but in the mean time the limitation having expired, and exceptions being taken to the second answer on that account, Master *Pechel* allowed the exceptions, and no exception was taken to his report.

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Lord Chancellor thought where a bill tended to charge a defendant with a crime, and make him liable to a penalty, if the crime or penalty is created by the common or statute law, the defendant need not plead or demur to it, but upon exceptions to the answer he might insist he was not liable.

But the time for suing the penalty being expired at the time of the second answer being put in, he thought the defendant liable to answer as far as the penalties to the crown extended.

Exceptions to the Master's report allowed (a).

(a) The modern cases upon this subject in which the doctrine has been much considered are collected in a note to the case of *Shepherd v. Roberts*, post, 239.



EARL of LONSDALE and Others v. CHURCH and Another.

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Rolls.

17th December.

BILL by the trustees for repairing, &c. the harbour of *Whitehaven*, against the late receiver and treasurer of the duties thereof, and his surety, for an account of sums of money received and disbursed, and of interest received on balances, from time to time, in his hands.

The case upon the bill, answer, and evidence, appeared to be as follows :

By 7 *Ann.* the trustees for the time being, or eleven or more of them, were authorised to appoint, by writing, a collector or collectors of the duties, &c. for repairing the harbour; and the sums received by him or them, were to be paid over to a receiver or receivers, to be appointed by the said trustees; and it was enacted, that the trustees should take of the collectors and receivers, sufficient security for duly collecting the duties, and accounting for the same; and the collectors and receivers were to be allowed for their pains in the office, as much as the trustees should think proper, not exceeding, for all together, 12*d.* in the pound.

In 1782, the defendant *Church* was appointed, by the trustees, clerk and receiver, at a salary of £60 *per ann.* in the room of *Spedding*, who had acted not only in that capacity, but also as treasurer; and *Spedding* having at that time a sum of £1,622. 16*s.* 3½*d.* in his hands, the same was, by the direction of the trustees, paid into the hands of the plaintiff *Dixon* (one of them)

A receiver of a public trust (having a salary) making interest of balances in his hands, is accountable to the trustees for interest made *ultra* his salary.

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as a banker, into whose hands the defendant *Church* was directed to pay the surplus monies in his hands from time to time, and in consequence of his appointment, the defendant *Church*, with the defendant *Benn*, as his surety, entered into a bond, in the penalty of £1,000, for the due receipt of the duties, to make regular payments to the tradesmen of the harbour, and to give a fair account of his receipts and disbursements, and pay the balance thereof to the trustees, or as they should appoint.

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The defendant received the duties, and passed his accounts yearly till 1784, when he was appointed treasurer as well as receiver, and the sum of £2,041. 16s. 3½d. then in the hands of *Dixon*, was paid over to him as treasurer: and upon passing his accounts in 1785, there appeared to be in his hands (inclusive of the money received from *Dixon*) a balance of £2,071. 7s. 8½d. and he was then requested to give a further security, which he did, by entering into a bond with the said *Benn* as his surety, in the penalty of £3,000, for the execution of the said appointment. And again, in 1787, the balance in his hands being further increased, he, with the same surety, entered into a third bond to the trustees.

About the 26th *February*, 1788, the plaintiffs removed the defendant *Church* from his said appointments.

The defendant, by his answer, admitted that, during the execution of the said appointments, he placed out several sums of money, being part of the balances in his hands, from time to time, on securities at interest, which interest was received and disposed of by him for his own use; and said he conceived he had a right so to do, not having been called upon by the trustees to pay the same.

In *March* 1788, three several actions were brought on the bonds, and the defendant *Church* held to bail thereon; and afterwards the present bill was filed for an account of the balances, from time to time, in defendant *Church*'s hands, and the interest made thereon, and praying that the securities should be assigned to the plaintiffs.

The cause was heard last term.

Mr. *Mitford*, Mr. *Graham*, and Mr. *Bolton*, for the plaintiffs. The plaintiffs only call upon the defendant to answer interest as far as he has made it. It is a point of equity, that where a man makes interest of the money of another, he shall pay the interest he so makes of it. The defendant had a salary of £60, might have left the money dead, and he would not be answerable for interest; but where he makes it, whether in the character of trustee, executor, or otherwise, he must pay the interest. 1 P. W. 140. *Ratcliffe v. Graves*, 1 Vern. 197. *Lee v. Lee*, 2 Vern. 548. *Hicks v. Hicks*, 3 Atk. 274. *Newton v. Bennet*, ante, vol. i. p. 359, *Perkins*

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Perkins v. Baynton, *ibid.* p. 375. *Treves v. Townshend*, *ibid.* p. 384. *Forster v. Forster*, *ante*, vol. ii. p. 616. *Bates v. King*, 30th October, 1789. This case is very different from that of a banker, because, in that case, no one can be deceived, as he knows by the course of the trade he is to receive no interest.

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Mr. *Solicitor-General*, Mr. *Lloyd*, and Mr. *Romilly*, for the defendants.—Under the acts of parliament, the trusts are to be executed by not less than 24 trustees: here are but 21 trustees plaintiffs, and one defendant. For any thing that appears on the record, the trustees to whom the bonds were given may still be trustees. Unless the plaintiffs had deduced a title to sue under the bond, they have not made such a case as will authorize the Court to make a decree. It is true the defendant has submitted to an account, but if they refuse to take the account in the manner in which he offers to give it, he is not bound by the submission.

The case of *Forster v. Forster*, was not that a receiver should pay interest which he had made, for in fact he had not made any; but that, not having paid the money as he ought, according to the order appointing him receiver, he should account for the same. The other cases are of persons invested with the character of trustees, and if they make interest, they undoubtedly must pay it. We admit if the defendant is a trustee, he must pay the interest made; but if the trustees gave him an express authority to make interest, they shall not call upon him for that interest; and there is sufficient evidence in this case for a court of law to presume there was a contract between the parties, that the defendant should not pay interest.

Mr. *Mitford*, in reply, insisted, that, being a public officer, the defendant was a trustee for the public.

This day his Honor gave judgment, and after stating the case as it is before stated, spoke to the following effect:

The question is, whether the receiver is not liable to account for the interest made of the money in his hands.

The first objection taken is, that the plaintiffs have no right to call upon him; but it does not appear who could have a right, if the present plaintiffs have not. No such objection is raised by his answer, in which he admits the right, and submits (in case the Court shall think proper) to pay interest for the balances in his hands. I am therefore of opinion that he is estopped by his answer from this objection; and it seems to me that the plaintiffs are persons who have a right to call upon him for the account.

Then the question is, whether, from the nature of the office, he is not accountable for interest. The present may be thought a hard case; but the only question is, whether in a court of equity, he may not be called upon.

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This is not a case (like that of *Lord Salisbury v. Wilkins*) (a) of a person dealing with his own servant, who clearly would not have a right to call upon him; for if a gentleman will permit his steward to make use of the money in his hands, he certainly shall not call upon him for the intermediate interest. So if these persons had been dealing with the clerk on the subject of their own money, and settled accounts with him, they would be bound by those settlements. But that is not the case here: his trust was for the public, to exact duties from all persons coming into the harbour; for which receipt he was to be paid at the rate of 1s. in the pound. Then it is said, that the trustees, though concerned for the public, may permit him to make interest till he is called upon to account for it; but the mischief to result from this would be very great: it might put it out of the power of the person who has such monies in his hands, to answer the public exigencies, and might give him public money in such a way that the public could not have the use of it. This cannot be shewn more strongly than by the present case; for when called upon to account and pay his balance, the receiver could not answer that call, because the money was out at interest. Then he objects that he was never called upon till the time of his discharge:—the question has nothing to do with the notice, but whether he had a right to use the money, and make interest of public property. The legislature, when they gave him 1s. in the pound, (or possibly two, if he united both offices, as it seems doubtful whether the trustees might not allow 1s. as collector, and 1s. as receiver) could not mean that he should make interest. I think, therefore, in order to the example, he ought to account for the interest. Not being accountable for interest would be a temptation to receivers not to be ready to pay money due from them when demanded.

It is a settled rule of the Court, that such a receiver shall pay in his balance every year; and if he keeps the money in his hands, he is answerable for interest. He is bound by his bond to have the money ready when called upon. If, therefore, he has made interest, he has done it contrary to the intent of the legislature, and the duty he owes to the public; and, therefore, he must

(a) This case is usually known by the name of the *Earl of Salisbury v. Wilkinson*. There is a report of another point, which arose in the cause, 1 Cox, 277. by the name of the *Earl of Salisbury v. Cecil, Wilkinson* having died before the hearing. It appears, from Lord Eldon's observations in *Lord Chedworth v. Edwards*, 8 Ves. 48, that the defendant was not charged with interest in consequence of the peculiar circumstances of the case. *Wilkinson* had from time to time informed Lord *Salisbury* what money was in his hands, and undertaken with him upon

his wish that there should always be a large sum in his hands, for which he should be responsible from time to time. It was a case therefore of principal and agent. Lord *Eldon*, however, seemed to entertain no doubt but that a steward was just as much liable to a charge of interest as any trustee, assignee, or executor, and, accordingly in the subsequent case of the *Earl of Hardwicke v. Vernon*, 14 Ves. 504, charged a steward with interest and costs; vide also *Middleditch v. Sharland*, 5 Ves. 87. *Beaumont v. Boulbee*, ib. 485.

answer

answer for the interest he made, notwithstanding the trustees may have been negligent in not calling for it sooner; for as his trust was to have the money ready when called upon, he must make it good for so much as he has received above his salary.

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This decree was affirmed as to the principal point, upon a re-hearing, in the Sittings at the Rolls, after *Hilary* Term 1790 (a).

(a) See all the cases upon this subject collected in the Editor's note to the case of *Newton v. Bennet*, ante, vol. i. 362.

FOX v. MACKRETH.

Lincoln's-Inn  
Hall, 16th Dec.

UPON taking the account decreed in this cause before the Master, the defendant admitted a certain charge, and claimed allowances by way of discharge, leaving a certain balance due from him. The Master had not made his report, but certified the state of the account. Mr. *Solicitor-General* moved this day, that the defendant might pay in the balance thus admitted by him to be due, into Court, in analogy to the practice of the Court, where a sum of money is admitted by an answer or schedule to be in the hands of the defendant, which is always ordered to be paid into Court.

The Court will not order a balance, upon charge and discharge in the Master's office, to be paid in, before the Master has made his report, even upon his certificate of the sum.

The motion was opposed by Mr. *Selwyn*, who insisted there never had been such an order, till after the Master had made his report; till which time the sum due was not considered as ascertained. That as to delays in the Master's office, there were other means of preventing them.

Lord Chancellor said, the motion was the first of the kind he ever remembered. That where money was admitted to be in a defendant's hand, the Court would order it to be paid in for safe custody; but here no specific sum was ascertained. With respect to delays, it was frequent to apply for orders for the Master to proceed *de die in diem*, but at present he could not make the order (l) (a).

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(l) THOMPSON v. PYEFINCH, 10th March, 1791.

Mr. *Mitford* moved, that certain sums admitted by defendant's examination to be in his hands, should be paid into the Bank in trust for the creditors.

Mr. *Fonblanque* objected, that the Master not having made his report, the motion was irregular.

But Lord Chancellor thought, if there was no other objection, that it was reasonable; and ordered it accordingly.

(a) Lord Eldon, in the case of *Quarrell v. Beckford*, 14 Ves: 177, gave the following account of the progress and present state of the doctrine upon this subject:

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subject: "I remember when, for the purpose of getting money paid into court by the defendant, it must have appeared, upon his answer, that the money was due. When the attempt was made to extend that, by a motion for payment into court of money, stated to be due, by the examination of the defendant in the Master's office, Lord Thurlow having, in some instances, refused, was at last prevailed on, with great doubt, to grant it: but upon this solid ground, that if it appears as clear upon that examination, looking to the rights and interests of the party, that money is due from him, as in the other case, upon the answer, there is no rea-

son against granting the application in the one case, as well as the other. The next attempt was, where, to avoid the principle so extended to the examination, the party did not cast up his schedule, and to that length, after considerable hesitation, the practice has arrived, and is now, at least, uniform; but the result must be clearly verified by affidavit, collecting clearly the result of the schedule: and furnishing the sum, which the one party has a right to demand, and the other is bound to pay." See, upon this subject, *Roberts v. Hartley*, ante, vol. i. 57. *Mills v. Hanson*, 8 Ves. 68. 91. *Roe v. Gudgeon*, Coop. Ch. Rep. 304.

Lincoln's-Inn
Hall, 21st Dec.

Creditor obtaining goods from his debtor, on credit, just before he breaks, shall not prove for the residue without giving up the goods.

Ex parte SMITH, in the Matter of LEWIS and POTTER.

PETITION to stay the dividend until *Lovel*, a creditor, should account for the value of goods to the amount of £270, obtained from the bankrupts, on credit, two days before they failed, and on suspicion that they were about so to do; and which he insisted on detaining as a part-payment of his debt. *Lovel* was since also become a bankrupt, and his assignees also insisted on a right to apply these goods as a part-payment.

Lord Chancellor thought *Lovel* could not avail himself of this advantage, and take a dividend for the residue, if the fact should turn out as stated, and therefore directed an issue to try the fact. He said *Lovel's* assignees stood in the same situation with *Lovel* (a).

(a) Vide Co. B. L. 7th edit. 139.

Lincoln's-Inn
Hall, on the same
day.

Creditor admitted to prove costs taxed after the commission, on verdict obtained before.

Ex parte SIMPSON, in the Matter of FLETCHER.

PETITION to be admitted to prove £111, costs in two actions on different policies, against the bankrupt, an underwriter; in one of which there was judgment by default, for want of a plea, and upon a writ of enquiry, 16th August, 1779, the damages were assessed, and 40s. costs; in the other, verdict for the sum underwritten, and 40s. costs.

The commission issued November 1780.—Final judgment was suspended by an injunction bill in the Exchequer; but at length, the injunction being dissolved on the merits, the judgment was signed 1783, and costs in both actions taxed at £111. 8s. which the commissioners refused to admit to be proved.

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Mr.

Mr. *Solicitor-General* and Mr. *Mansfield* argued—that this was a debt subsequent to the bankruptcy, commencing upon the taxation; and therefore could not be proved under the commission, and assimilated the present case to that 1 Atk. 140. and *Ex parte Sneaps*, 1 Co. B. L. 236.

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Mr. *Simeon*, in support of the petition, argued—that the case *Ex parte Sneaps* was costs for a contempt of Chancery, not an action at law, and was rightly determined. The case 1 Atk. 140. has been over-ruled. 2 Bl. Rep. 1317. Cowp. 25. 138. 1 Wils. 141. *Langford v. Ellis*, East. 1785. 1 Co. B. L. 227. *Lewis v. Piercy*, 1 H. Bl. 29. 1 Co. B. L. 508. in which bankrupts had been discharged out of execution, not only for the principal debt due before the bankruptcy, but for the costs taxed after the bankruptcy; and though the point had never been determined in this Court, on petition, it was a necessary consequence that the creditor must be admitted to prove such costs under the commission, or otherwise the bankrupt must remain liable: the propositions are convertible. It is so on principle, for the stat. of *Gloster* gives the costs of the writ, which has always been considered as the costs of the whole proceeding at law, which costs had a reference to the verdict.

Lord Chancellor doubted before the argument, and inclined against the petition; but after the argument he made the order, saying, the point had been determined at law in the cases cited. Whenever the judgment is recovered, the former debt is at an end (a).

(a) The doctrine upon this subject, which had departed from the old determinations, has been lately settled, upon very great consideration, and brought back to its original correctness. The first case upon the subject was *Ex parte Todd*, before Lord *Northington*, cited 3 Wils. 270. as having been after a verdict, and 11 Ves. 651. as after a nonsuit. The Editor has searched the book of the Secretary of Bankrupts for it, but without success. His Lordship there held, that until judgment there was no demand at law for costs: and the judgment being after the bankruptcy, there was not a debt at the date of the commission, and the costs could not be proved. In *Walter v. Sherlock*, cit. 3 Wils. 270. 272. and 11 Ves. 652. in which (though there is some confusion in the reports of the case) it appears that upon a bankruptcy between verdict and judgment, it was determined that the costs could not be proved, not only because they were unliquidated, but because there was no judgment. And by analogy to these

decisions, Lord *Thurlow*, in the above cited case of *Ex parte Sneaps*, held that the taxation constituted the demand.

But this sound and correct doctrine was afterwards broken in upon by the present, and the several cases above cited; to which must be added, *Hurst v. Mead*, 5 T. R. 365. *Philips v. Brown*, 6 T. R. 282. *Watts v. Hart*, 1 B. & P. 134. *Willett v. Pringle*, 2 N. R. 190.

Upon this question, however, coming on before Lord *Eldon*, in the case of *Ex parte Hill*, 11 Ves. 646. 2 N. R. 191. n. his Lordship, after a luminous and elaborate review of all the cases, expressed his decided approbation of the rule, as originally laid down by Lord *Northington*; and held, that where there was a verdict and judgment after bankruptcy, in an action previously brought, costs could not be proved. His Lordship afterwards, in the case of *Ex parte Charles*, 16 Ves. 256. where there had been a verdict for damages, and a commission issued before the judgment, held that there was not a sufficient debt to support a commission;

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sion; but, as his opinion contradicted so many cases, and particularly that of *Langford v. Ellis*, his Lordship granted a case: upon which the Court of King's Bench certified against the debt, 14 East, 197. This decision has been followed by *Buss v. Gilbert*, 2 M. & S. 70. and *Walker v. Barnes*, 5 Taunt. 778.

1 Marsh. 346. and the case of *Ex parte Smeapa*, by the King v. *Davis*, 9 East, 318. where it was decided that the costs of a suit, directed to be paid by an award made before the bankruptcy, but which were not taxed till after, could not be proved under the commission.

Lincoln's-Inn
Hall, on the same
day.

Creditor borrows money, which he afterwards repays with interest, after a secret act of bankruptcy; the loan being repaid, shall be considered as never borrowed, and he shall prove his whole debt.

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Ex parte CONGALTON, in the Matter of ELIZABETH TYLER.

ELIZABETH TYLER carried on the business of a navy-agent, and as such was employed by the petitioner. On the 11th November, 1784, by an account delivered from her, it appeared she was debtor to the petitioner £312. 1s. 10d. which the petitioner directed her to invest for him in stock. On the 13th November, her nephew informed him the stock was bought, and a copy of a broker's note was sent him to that effect, which he imagined clear proof.

On the 20th November, 1784, the petitioner applied to *Elizabeth Tyler* to lend him £163, which he repaid her with five per cent. interest thereon, after a secret act of bankruptcy committed by her.

The petition was to be let in to prove the whole debt due from *Elizabeth Tyler* to the petitioner, the stock having never been bought.

It was insisted against the petition, that the £163, must be deducted from the sum to be proved, as having been paid the petitioner by *Elizabeth Tyler*; and that the re-payment being after a secret act of bankruptcy, was a nullity, and not protected by the statute, as it was not in the usual course of trade. The balance, therefore, must be struck, as it was at the time of the bankruptcy unvaried by the payment after it.

Lord Chancellor said, it was manifest the £163 was a loan, and no payment, that having been repaid, though after the secret act of bankruptcy, it was to be considered as if the money had never been lent; and ordered the petitioner to be admitted to prove his whole debt (a).

(a) Vide Co. B. L. 7th edit. 555. See the case cited in *Cox v. Morgan*, 2 B. & P. 398.

HILARY TERM.

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POOLE v. RUDD.

Mr. Justice Buller
for Lord Chan-
cellor.

THIS was a petition to set aside a contract for the purchase of an estate, which had been heard by Mr. Justice *Buller* sitting for *Lord Chancellor*, on the day of petitions before term. A question arose, at the hearing, whether a sum of money paid at the auction, was to be considered as a part of the purchase money, and, therefore, the seller to have the benefit accruing by a rise of the fund in which it was invested, or the purchaser was to have that advantage; upon which Mr. Justice *Buller* took time to consider, and upon the first cause day in the term gave judgment.

Money paid in as earnest at a sale of an estate, and ordered to be laid out in the funds, is part payment of the purchase-money, and the vendor must abide by the rise or fall of the funds.

Mr. Justice *Buller* said, he had taken time to consider it, on account of its being a matter of great importance, and that he was not sufficiently informed as to the rule that had been laid down: that the first thing to be considered was, whether the Court had laid down any rule: if it had, it ought to be abided by; for he was a great enemy to making nice distinctions between cases before the Court, and those already determined:—that Mr. *Mitford* had referred to a case of *D'Oyley v. The Countess of Powis*, (ante, vol. ii. p. 32.) but that the report was so short, that he could not tell whether that case was precisely the same as the present. It only appeared, that the money was laid out by Lord *Beauchamp*, and it seemed to be laid out upon his application. That the general rule laid down was, that it was considered as being in payment, and if so, it was indifferent which side applied that it should be laid out. That it appeared that was not a new case, for that Sir *Thomas Sewel* had made several such orders, and the money paid in was already considered as in part-payment. This obviates the doubt as to the vendor, who must always take the stock as he can find it. Another circumstance in this case makes it clearer, that the money was paid into the hands of the auctioneer, who paid it to the agent of the vendor; therefore the general rule has prevailed, that let the money be laid out as it will, it is a payment for so much of the purchase-money. And, if laid out without opposition from the seller, it must be presumed to be with his assent. If laid out under the authority of the Court, it will be binding on both.

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Another ground on which the petition must be dismissed is, that it comes after a decree for a specific performance.

His Lordship was going into other merits of the petition, when it being alledged that the parties had agreed to draw up the order agreeable to the opinion he should pronounce on the subject of the money laid out; he ordered the petition to be dismissed (a).

(a) The subsequent cases are collected in the Editor's note to *D'Oy-ley v. The Countess of Powis*, ante, vol. ii. 33.



MALCOLM v. MARTIN and Others.

Rolls, 1st Feb.

Testator living in Antigua gives legacies described to be sterling; then another without that description, the interest to be paid to the children of J. G. and Mrs. L. for life, then the principal to be divided among the grand-children of J. G. and Mrs. L. 1st. the legacy is only a legacy of current money of Antigua. 3d. The interest to be paid to the children for life shall be at 4 per cent. not Antigua interest. 3d. There being no children of J. G. [51] the children of Mrs. L. shall take the whole interest for their lives; nothing passing to the grand-children till the death of all.

PATRICK MALCOLM, late of the island of *Antigua*, deceased, made his will, dated 16th *August*, 1785, and thereby gave to his sister *Janet Mackenzie*, (since deceased,) the interest of £1,000 sterling for her life, and at her decease, that sum to be equally divided between the plaintiffs the *Malcolms*.—He also gave to the children of Mr. John Glass, deceased, and the children of Mrs. Lyon, deceased, (who were defendants,) the interest of £1,500 for life, to be equally divided between them, and at their decease, the same to be divided betwixt the grand-children of each Mr. Glass and Mrs. Lyon; and appointed the defendant *Samuel Martin* and other executors. The testator died 20th *August*, 1785.

John Glass died in the life-time of the testator, leaving no children surviving him, but having, at the time of his decease, and of the decease of the testator, five grand-children by his daughter *Agnes*, who was married to *Thomas Sandeman*, and who died before her father, and also one grand-child by another daughter, *Ann Glass*. These grand-children of *John Glass* were defendants.

Agnes Lyon, the testator's sister, also died in his life-time, leaving three children all now living; and defendants, of whom one, *Robert Lyon*, had, at the decease of the testator, nine children, one of whom was since deceased; the other eight were defendants.

The bill was filed by the plaintiff against the acting executor, and the several other defendants, charging that the legacy of £1,500 given to the defendants, children of Mr. *Glass* and Mrs. *Lyon*, for life, remainder to the grand-children, ought to be considered as currency of the island of *Antigua*, where the testator had lived upwards of 20 years, and where he died; and claiming the legacies given to *Janet Mackenzie* for life, with remainder over to them.

The

The defendants, who claimed as grand-children of *Mr. Glass*, submitted by their answer, that their parents being deceased, a moiety of the legacy, in sterling, was, with the interest thereon, to be declared to belong immediately to them and the said defendants, the grand-children of *Agnes Lyon*: and that upon the death of the three children of *Agnes Lyon*, the other moiety should be divided among them, or if the Court should be of opinion that no part became payable, but that the three children of *Agnes Lyon*, were entitled to the interest for life, either with or without benefit of survivorship, hoped they should be declared entitled subject to their interests.

The defendants, children of *Agnes Lyon*, claimed the whole interest of the legacy, as sterling money, for life, with benefit of survivorship, and prayed that the same might be secured for their benefit, and that of the other parties.

The cause came on at the Rolls, 6th *July*, 1788, when

Mr. Selwyn and *Mr. Daniel* argued for the plaintiffs, That the legacy to the defendants of £1,500 not having the word *sterling* annexed to it, must be paid only in the currency of *Antigua*, and for this they cited the case of *Saunders v. Drake*, 2 *Atk.* 465. where a testator living in *Jamaica*, gave legacies to be paid in *sterling* money, and gave two legacies immediately following, (one of which was plaintiff's) generally, and afterwards other legacies, to be paid in *sterling* money; Lord *Hardwicke* held the plaintiff's legacies to be of *currency* only; and that of *Pierson v. Garnet*, (ante, vol. ii. p. 38.) where legacies given generally, in *Ireland*, were decreed to be legacies of *Irish* currency, not *sterling*.

Mr. Mitford and *Mr. King*, for the children of *Mrs. Lyon*, argued, That they must take the whole interest for their lives. The testator expressly says, the principal is not to be divided till after the decease of the children of both, and there being no children of *Glass* at the testator's decease, it is clear only the children of *Mrs. Lyon* can answer the description. The intention clearly was, that the children of *Glass* and *Lyon* should take the whole interest before the grand-children should take any thing. If this was otherwise, the whole fund would not be divided in the same manner. By this way, all the grand-children will take; on the contrary construction it may happen that only some of them may take.

Mr. Ainge and *Mr. Hatton*, for the grand-children of *Mr. Glass*, contended, That the children of *Mrs. Lyon* were entitled to only a moiety, and that their clients were entitled to one moiety immediately. It was not known to the testator, when he made his will, that *Glass* had at that time no children. He meant to divide the fund between the children of *Glass* and *Lyon*, and then to give it to the grand-children. It is a tenancy in common between the two
stocks,

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stocks, and one stock being extinct, the representative must take that moiety immediately; for if the children of *Lyon* are entitled for life, it must still, after their decease, be divided *per stirpes*: and if a moiety is remaining to be divided, the grand-children of both will take *per capita*.

On the 1st *February*, his Honour gave judgment to the following effect:

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The question is with respect to the interest of the grand-children of *Glass* and *Lyon*. It is clear they are not to take till after the failure of the children; it is, therefore, unnecessary at present to decide how they will take them. Although the fund is not given to the survivors, it cannot go over till the death of the children of both. Mr. *Ainge* contended there was a difference between the claims of the issue of Mr. *Glass* and Mrs. *Lyon*; that difference was argued in *Wicker v. Mitford*, (reported in Mr. *Hargrave's Tracts*, p. 513.) The tenancy in common implied in the will, can only extend to the interest; but the principal being only given over after the death of the children, occasions a necessity to consider it as a joint-tenancy. A case not cited proves the principle, that the words of a will, if they will bear a sensible construction, must be taken in that sense. *Blackler v. Webb*, 2 P. W. 383. where Lord Chancellor *King* said, that to determine the grand-children to take *per stirpes*, would be to go too much out of the will. *Thomas v. Hole*, For. 251. is to the same effect. In *Jackson v. Clarke*, Lord *King* thought himself bound by the words of the will. The words, here, are the interest to the children of *Glass* and Mrs. *Lyon* for life, and after their decease the principal to be divided among the grand-children. I must declare, therefore, that the interest of the £1,500 must be divided among the children of Mrs. *Lyon* during their lives (a).

2. Then the testator by his will has given some legacies described as *sterling*, others (among which this is) without that description; I am satisfied, by the case of *Saunders v. Drake*, that I must declare the *sterling legacies* are to be paid in *sterling* money, and the other in *Antigua* currency (b).

3. There is a question, whether the interest should be *Antigua* interest, or the interest of the Court. In *Pierson v. Garnet*, Sir *Lloyd Kenyon* gave interest at 4 per cent. though he decreed the legacies to be currency. In *Saunders v. Drake*, it was decreed according to the custom of the island, but that point does not appear clearly in the Register's book. The point was not argued in *Pierson v. Garnet*. It is not proper to decide on this point. If I was sure it would go further, I would decide the point. There have been several cases upon the point decided differently. *Staple-*

(a) The cases upon this subject are collected in a note to the case of *Phillips v. Gurth*, post, 64.

(b) As to this, vide *Pierson v. Garnet*, ante, vol. ii. 38.

ton v. Conway, 1 Ves. 427. It appears *that* was upon contract, not a legacy, *English* interest only was given. In *Holme v. Allwright*, cited in *Boddam v. Ryley*, (ante, vol. ii. p. 2.) *Indian* interest was given. If the matter was *res integra*, I think there is no reason for giving more than the usual interest given by the Court. What is the ground on which the Court gives 4 *per cent.* interest? That the fund is supposed, in the course of the year to come into the hands of the executor, and that the executor can make 4 *per cent.* of it here. If it was made out, indeed, that the fund was abroad, and greater interest made, it might be otherwise. But I am rather disposed to postpone the decision of this point.

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His Honour afterwards decreed the interest to be at 4 *per cent.* (a).

(a) The cases upon this subject, which are contradictory, were examined by Sir W. Grant, in *Bourke v. Ricketts*, 10 Ves. 330. It appears that the mere bequest of a legacy in a foreign country, does not give it with the rate of interest of that country. In that case there being a fund in *England*, and another in *Jamaica*, as the legatees sued in *England* they were held not entitled to *Jamaica* interest. The principle upon which interest is computed upon legacies, from a year after the death of the testator, being the presumption that the property is got

in at that time, and is making interest; but the Court could not presume that the executor was making *Jamaica* interest. In *Raymond v. Broadbelt*, 5 Ves. 199. indeed, Lord Rossign, upon a legacy directed to be paid in *Jamaica* currency, gave interest accordingly. But that turned upon the particular circumstances of the case, the property having been in *Jamaica* some time, and while there, carrying *Jamaica* interest, and having been remitted upon advantageous terms, in the course of exchange, giving a profit, at least equal to *Jamaica* interest.

PETERS v. ERVING and Others.

THE plaintiffs are the executors of *Thomas Moffat*, late of *Newport* in *Rhode Island*, M. D. deceased, and the defendants executors of *John Erving*, late of *Boston* in *Massachusetts-bay*, (some of them resident in *England*, and others in *America*) and the executor of *John Moffat* deceased.

Thomas Moffat, the plaintiff's testator, being possessed of a considerable estate in *America*, and being a loyal subject of *England*, entered, with other persons into a bond to *Erving*, the defendant's testator, dated 29th *July*, 1765, in the sum of £1,975 *Massachuset's* currency, being the value of £1,477. 10s. *English* money, for securing payment of £984. 13s. 4d. currency, equal to £738. 15s. *English* money, and being obliged to withdraw himself from *America*, in *May* 1775, arrived in *Great Britain*, and died at *Westminster*, 14th *March*, 1787. *Erving*, though a loyalist, was

Creditor having power to obtain warrants for payment of an *American* loyalist's debt out of his estate in *America*, is bound, on being referred to that property by the debtor, to make it available as far as may be: but when the creditor is not informed of such property, no laches can be imputed to him; he,

therefore, shall not be restrained by injunction from prosecuting his suit here; although the debtor shall have liberty to make use of the creditor's name to obtain the warrants to make them available as far as may be.

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permitted to stay in *America* (being very old and infirm, and giving security for his good behaviour) till his death in the year 1786. The other obligors in the bond, lived in *America*, and they, or some of them had paid part of the debt, so that there remained a balance due to the defendants of about £259. Upon this bond the defendants brought their action in the *King's Bench*, against the plaintiff as executor of *Moffat*.

The plaintiff filed this bill for an account of the money really paid, and for an injunction to restrain the defendants from proceeding on the bond: stating, that the plaintiff's testator had considerable property in *America*, (which the bill particularised) and that the persons who opposed his Majesty's government in *America*, passed sundry acts of Assembly, having the force of laws, whereby all persons who had withdrawn from the States, now called *The United States of America*, into the dominions of the King of *Great Britain*, were declared aliens, and to have incurred the forfeiture of their goods, chattels, and real estates; and by the said laws, it was enacted, that all debts justly due from the forfeiting persons to any subject of the *States of America*, should be payable out of the forfeited estates; it further stated, that the whole property of plaintiff's testator was forfeited and sold, subject to his debts; and that his estates were sufficient to have paid his debts; that therefore the defendants had been paid, or might have been paid the whole of the debt.

Before the coming in of the answer, the defendants moved to dissolve the injunction, which was continued on plaintiff's depositing a certificate of the commissioners of *American* claims, of doctor *Moffat's* losses, as a security.

The defendants here, by their answers, stated, that they did not know, till informed by the bill, that *Moffat* had property in *America*, and denied that they could have received payment of the bond from the *States*.

The defendants in *America*, say, that at the time of the forfeitures, warrants might have been obtained for payment of the debts, but that they would not now produce more than four or five shillings in the pound.

Mr. *Solicitor-General* now moved to dissolve the injunction.

Mr. *Mitford* and Mr. *Richardson*, for the plaintiff shewed cause.

The executors in *America* state what *Moffat's* property sold for, and acknowledge several payments to have been made. They admit that *Moffat's* estates were forfeited, subject to his debts; but say they could not obtain payment, because the estates were appropriated to other purposes; and that the warrants obtained in *America*, would not have been paid, and were not, now, worth
more

more than four shillings in the pound.—To that extent, we are clearly entitled to relief.

This question came on before your Lordship in *Wright v. Nutt*, post, 326. and 1 H. Bl. 123. where your Lordship said, the party had an equity, as far as the debtor's property could be made available. Even supposing the warrants to be worth only four shillings in the pound, we shall shew there were effects to pay the debt. The effects sold for £1,370, the balance due is but £259.

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Mr. Solicitor-General and Mr. Hart, for the defendants.—It is stated too high, when it is stated that the defendant *Erving* was an *American* subject; he took part with this country; his sons came away, but he being old, continued there till his death.

During *Moffat's* life-time, he never desired the creditors to apply there, or even informed them he had *American* property; but paid money on account of the bond; so that whatever may be the case of a debtor who points out to his creditor a fund from which he may be paid, this is not that case; and the executor cannot, at the distance of 13 or 14 years, refer the creditor to that fund.

Although it is admitted that, in 1775, the defendant might have had a remedy, in *America*, if referred thither at the time, there is now no fund. The executors swear, that if warrants had been obtained, they would not now have been worth more than four or five shillings in the pound.

Lord Chancellor said, he thought if the creditor could *bonâ fide* obtain any thing there, he ought so to do. The query here is, whether, now, any thing can be obtained; but the defendants swearing, they did not know of the debtor's property there, till the filing of the bill, no laches can be imputed to them for not applying to a fund of which they were not informed.

The injunction was therefore dissolved, the certificate to be returned, and the plaintiffs to be at liberty to use defendant's name, to obtain warrants for payment in *America*, and make them available as far as might be (a).

(a) Vide *Wright v. Nutt*, post, 326, and the Editor's note.

THRALE v. ROSS.

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BILL praying an injunction to stay trial on a bond, dated 1st March, 1766, and given by the plaintiff, to the defendant Ross, in the penalty of £5,000, with a condition underwritten to

Action at law on a bond given to a trustee, only reciting that the obligor was (on

the resignation of obligee's *cestui que trust*) appointed to an office, not restrained by injunction; but may be pleaded at law in order to try whether the consideration was corrupt.

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the following effect: Whereas, on the of last *December*, the above bounden *James Thrall* was (on the resignation of *Charles Gordon*, Esq.) appointed his Majesty's consul to the State of *Tunis*, it is thereupon agreed, that if the above bounden *James Thrall*, his executors, &c. shall pay to *George Ross* (the defendant) out of the salary, £200 *per annum*, which annuity is to be in trust for the said *Charles Gordon*, during his life; and as long as the said *James Thrall* shall enjoy the office, as to £50 to *Margaret Gordon*, wife to the said *Charles Gordon*, and £150 to the said *George Ross*, to pay the debt due to him from the said *Charles Gordon*; then the bond to be void.

Mr. *Solicitor-General*, Mr. *Mansfield*, and Mr. *Steel*, shewed cause against dissolving the injunction.

They contended that the bond was upon a bad consideration; and that a jury, from the recital, would see what that consideration was; that it was manifestly a bond given for the resignation of an office, that the plaintiff might be appointed to it; and cited the case of *Hanington v. Duchatel*, (ante, vol. i. p. 124) that it was sufficient to support an application here, that though it might be pleaded at law, it never had been so done. That in the case of marriage brokage, there could be little doubt but it would be pleadable at law, yet it never had been so pleaded; and there was not a doubt but this Court would entertain a jurisdiction in that case.

But *Lord Chancellor* was of opinion that it ought to be pleaded, in order to try the question whether the consideration was corrupt; saying, that in case it should appear to be for the resignation of the office, that might be sufficient: if it was for the appointment it would be still stronger, and, therefore

Dissolved the injunction (a).

(a) See, upon this subject, the cases cited in the Editor's note to *Hanington v. Duchatel*, cit. sup.

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WYNDHAM v. WYNDHAM.

Testator ordered his trustees, out of certain funds, to pay to his wife, what should be

to be returned to her of her portion; and to invest the residue in funds, to pay her the interest for life, then to pay the interest to his niece, for life, then to pay the principal to her children, if any; if not to the younger children of *H. W. W.* if any, if not to the defendant *W. W.* and gave the residue of his effects to his wife. The niece and nephew had neither of them children. The intermediate interest, from the death of the niece to that of the nephew, shall not follow the principal, but fall into the residue, and go to the wife's executor, as personal estate of the testator undisposed of.

WADHAM WYNDHAM by his will, 28th *July*, 1763, desired his nephew *Wyndham*, meaning *Helyar Wadham Wyndham*, and his cousin *Penruddock Wyndham* the (plaintiff)

would,

would, as his trustees, settle an account of what he had in the public funds, bonds, mortgages, or securities, and after paying his dear wife *Catherine Wyndham*, what, by their marriage articles, was to be repaid her of her fortune, to vest the remainder in the public funds, in trust, and the interest, as it became due, to pay to his dear wife for life, and after her decease, to his dear niece *Ann Cope*, (meaning the lady of Sir *Richard Cope*, Bart.) for life, but if she should die, leaving any child, or children, he desired they would pay the principal to them; but if she should die without any child or children, he then left it to the younger children of his nephew *Helyar Wadham Wyndham* if he should have any, if not, he then left it to his cousin (the defendant) *Wadham Wyndham*. He gave and bequeathed all the rest, (after giving some specific legacies) of his plate, jewels, household furniture, coaches, chariots, horses, stock on his farm, cows, and every thing else he had any property in, to his dear wife, and appointed her executrix.

Wadham Wyndham died in October, 1759; the trustees paid the wife what was due to her under the settlement, and invested £1,008 and other sums in the 5 per cent. Bank stock and other funds, and paid the interest to *Catherine*, the wife, during her life. She died, and, by will, made the defendant *Huntley* sole executor.

The trustees paid the interest to Lady *Cope*, during her life; and she dying without children, and *Helyar Wadham Wyndham* being then unmarried, the principal money, laid out in the funds, vested in *Wadham Wyndham*, subject to the contingency in favour of *Helyar Wadham Wyndham*'s younger children, if he should have any. *Helyar Wadham Wyndham* afterwards died February, 1784, without children; and a doubt having arisen, whether the interest of the funds, from the death of Lady *Cope*, to that of *Helyar Wadham Wyndham*, belonged to *Wadham Wyndham*, or fell, as undisposed of, into the residue of the testator's estate: it was paid into the hands of Messrs. *Hoares*, and the present bill filed, by the surviving trustee, to have the opinion of the Court on that question, which was solely between the defendants.

Mr. *Solicitor-General*, for the defendant *Huntley* executor of the wife, contended that this interest was undisposed of, and fell into the residue. He cited *Green v. Ekins*, 2 Atk. 473. and *Haughton v. Harrison*, ibid. p. 329.

Mr. *Milford* and Mr. *Stratford*, for the defendant *Wadham Wyndham*.—The interest between the death of Lady *Cope* and *Helyar Wadham Wyndham*, passes by the will, and belongs to *Wadham Wyndham*. The intention of the testator appears to be, to give every thing that remains at the death of Lady *Cope*, to her children, if she had any; and all that he gave to the children

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dren of Lady Cope, he meant to go to the children of *Helyar Wadham Wyndham*, and if he had no child, then to *Wadham Wyndham*, who is substituted for the children of Lady Cope, or *Helyar Wadham Wyndham*. The gift to *Wadham Wyndham*, is a residuary fund, as to the property of which the interest is given to the wife for life. The rule of not being in abeyance, does not apply to this, as to a freehold estate. It could not be the intention of the testator, that the interest should go differently from the principal; where he did intend it to go differently, he gave the principal to the trustee; but where he did not so give it, he meant it to follow the principal; and interest on a particular remainder will follow that, as the interest on the general residue will that general residue: but here the particular residue can never go with the general residue, being vested in *Wadham Wyndham*.

Lord Chancellor thought it surprising that there was no case in which this question had occurred; but said, where interest, till an event arrived, was not disposed of, it must fall into the residue: as suppose the testator gave a bond to a particular person, not to vest in him till a given time, the intermediate interest must vest in the executor; and if a residue was given in the same way, the interest would also go to the executor.

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An account must be taken of the intermediate interest, as a part of the testator's general personal estate (a).

(a) The case of *Descrampes v. Tomkins*, determined in 1784, cit. post, vol. iv. 150. does not seem to have been cited in the present case, though in point. In *Shaw v. Cunliffe*, post, vol. iv. 144, Lord Commissioner *Eyre*, and the rest of the Court, cited the present case, as conclusive upon the point: and it may now be considered as established, that if there be a fund, whether residuary or particular, given

to A. for life, and afterwards upon a contingency which does not take effect upon the death of the tenant for life, the intermediate interest is an interest undisposed of, and therefore falls into the residue: and no distinction between a general residue, or a particular part of a residue severed for the purpose of being a productive fund, so as to create an interest to the tenant for life, has prevailed.

S. C.

2 Cox, 223.

Lincoln's-Inn
Hall, 1st March.

The Court will not give a maintenance for the time previous to the report of the father not being of ability to maintain the children, except on very particular circumstances.

ANDREWS v. PARTINGTON.

THE grandfather, having given several legacies, gave the residue to his grand-children at 21, and the produce, in the mean while, to the trustees, for their maintenance, and appointed four trustees, of whom the father was one.

Mr. *Partington*, one of the trustees, had expended £400 a year for 10 years, in the maintenance of the children, previous to any report as to the ability of the parent to maintain them. And the question now was, whether he should be allowed the sum so advanced, and whether any maintenance should be allowed the children before the report.

Mr.

Mr. Mitford, Mr. Mansfield, and Mr. Graham, for the trustees, insisted that the words of the will were imperative upon the trustees to allow a maintenance to the children; and that this had been done, and particularly referred to a case, *Fitzgerald v. Carey*, Mich. 1770.

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Lord Chancellor said, although where there had been a bigoted father who would not (m) educate the child in the protestant religion, the allowance had been made to the trustees, it was contrary to all rules, that the interest, vested in the children, should be applied to their maintenance in the life-time of the parent. That this would amount to a gift to the parent of so much as should be necessary for the maintenance, and the father being a trustee, can make no difference. He therefore ordered the reference to be only as to the ability of the parent, and what would be necessary for the future maintenance of the children (a).

But afterwards, by consent of the children in *England*, and adult, their proportions were ordered to be paid (b).

(m) In this case the father could not educate the child, as he was, at his father's death, abroad; where he had been obliged to continue, and had no provision under his father's will. Vide 3 Ves. 733.

(a) The rules laid down in the present and other cases, *Hughes v. Hughes*, ante, vol. i. 387, *Hills v. Chapman*, ante, vol. ii. 231, *Palsford v. Hunter*, post, 416, have not only been departed from in modern practice, but it has been stated (3 Ves. 733.) that Lord Thurlow himself changed his opinion upon the subject. At present the Court looks with great liberality at the peculiar circumstances of each case, and will make such order as the rule prescribed by the testator justifies, and the conduct and situation of the parties allow. *Mundy v. Earl Howe*, post, vol. iv. 223. *Hoste v. Pratt*, 3 Ves. 730. *Sisson v. Shaw*, 9 Ves. 285. *Collis v. Blackburn*, ib. 470. *Maberly v. Turton*, 14 Ves. 499. *Jervoise v. Silk*, Coop. Ch. Rep. 52. Maintenance therefore will be allowed even where there is a direction for accumulation, and the principal with the accumulation to be paid at twenty-one, where some or one of the children must take the property by survivorship, all being considered as having an equal chance. *Fairman v. Green*, 10 Ves. 45. *Ex parte Kebble*, 11 Ves.

604. *Aynsworth v. Pratchett*, 13 Ves. 321. *Errat v. Barlow*, 14 Ves. 202. *Stretch v. Watkins*, 1 Mad. Rep. 253. But if there is a gift over it cannot be done without the consent of the legatee, which was taken in *Cavendish v. Mercer*, 5 Ves. 195 n. *Fendall v. Nash*, ib. 198 n. and the circumstance that such legatee has a gift by another part of the will makes no difference. *Fairman v. Green. Ex parte Kebble*. Nor if the children are not all the persons amongst whom it is to go, as in *Sir F. Eden's* case, where Lord Rosslyn had directed it, but Lord Eldon afterwards refused to continue it, as future children then unborn might be the persons to take part of it, cit. 11 Ves. 48, 604. *Errington v. Chapman*, 12 Ves. 20; for which reason the case of *Fendall v. Nash*, cit. sup. was improperly determined, as the principal and interest might upon certain contingencies, have gone to individuals who were not in existence.

(b) See post, 401, for another very important point which arose in this cause.

1790.

S. C.

1 Ves. jun. 100.

2 Cox, 220.

Lincoln's-Inn
Hall, 8th and 9th
March.

Where a father gives a sum to his daughter, by will, and afterwards gives an equal sum as a portion, it is presumed to be an ademption. A conversation, in order to repel the presumption, must clearly refer to the gift by will, not to any hope of the father, as to a further provision from another fund, which he makes known to the party.

ELLISON and Wife v. COOKSON.

THIS cause, which had been heard before Lord *Kenyon*, when sitting, as Master of the *Rolls*, for Lord Chancellor, 27th Feb. 1788, and the bill dismissed, (vide ante, vol. ii. p. 307.) was now reheard.

It appeared that Mr. *Cookson* had an elder daughter, who was married at the time of the will and instructions, who at her marriage had a portion of £5,000, and whose name was not mentioned in the will or instructions.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Graham*, for the plaintiffs.—The question is, whether, under the circumstances of this case, the legacy of £5,000 given in the paper of instructions, is taken away.

We do not mean to dispute the rule, that where a father, by will, gives his child £5,000, and afterwards pays £5,000 as a portion, this is an ademption; though it will be otherwise in the case of a stranger: *Powel v. Cleaver* (ante, vol. ii. p. 499.) But if there be any thing to shew that the portion was paid without an intention to adeem, the mere payment will not amount to an ademption, *Debeze v. Man*, (ante, vol. ii. p. 165.) where a very slight conversation was held sufficient. Here the strongest evidence arises from *Bush's* treaty with the father, that he intended to give his daughter a further fortune. The evidence here is stronger that he did not mean to adeem, than that he did. But this is not the proper tribunal to judge of that evidence. In this case, the instruments are not codicils, they are all on one paper, and dated on the same day. And, for the six years that the father survived, he never made any declaration, that he intended the £5,000 given as a portion, to be a satisfaction for that given by the will, though he knew at the time he gave her the £5,000 portion, that he had given her £5,000 by the will; he therefore meant to keep it in his own power, during his life.

Mr. *Solicitor-General*, Mr. *Mitford*, Mr. *Ridley*, and Mr. *Richards*, for the defendant.—There is no difficulty in settling the principle upon which the judgment in this case must proceed, that where a parent has given a sum of money to the child, by will, and afterwards pays an equal sum upon marriage, such payment is an ademption. A consequence of this rule is, that the parent is supposed to be conusant of it; and that, merely, keeping the will by him, does not repel the presumption; for it is a settled rule of the Court, that there must be some evidence set up to rebut the presumption. This rule may in some cases have done injustice; but, in the present case, it is impossible that it should. The state of the testator's family was this; he had four sons and three daughters; the eldest daughter was married, and he had given

given her, on her marriage, £5,000, he takes no notice of her in his will; he gives *Hannah* and *Sarah* £5,000 each; to the sons he gives £10,000 each: it is in evidence, that *Hannah* was a very favourite child; but he certainly meant to provide equally for his daughters, and would not undertake to give her a further sum.—Mr. *Buck*, in his letter, says, he refused to promise any specific sum, and his *plan* certainly meant to refer to what might be done in future by his wife. Mr. *Cookson*, afterwards, says Mr. *Buck* has mistaken what may be possible or probable; but he would not say that it even was probable that the further sum would be £5,000. It was to await the chance of the savings, and Mrs. *Cookson* was to judge of the merits of her children, though he might think it might amount to £5,000, but the father has by no means undertaken for that sum. If they have not made out a claim to £5,000, they cannot claim any sum. Then the presumption stands that by giving the £5,000 he adeemed the legacy.—Then it is said, he could not mean to adeem the legacy unless he struck it out of the will. But this has never been expected. Suppose he had died immediately after the marriage; could it have been argued, that the legacy was not adeemed? The living till 1783 is not important. A similar length of time has never been held to be, of itself, a circumstance to rebut the presumption. Then it rests upon the amount of the declarations, which, certainly, do not amount to a promise of £5,000.

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*Lord Chancellor*.—At first, I thought I ought to say the gift was in satisfaction of the legacy. The argument is, that the will is a distribution of the testator's property among his children; and if he advances the proportion to a child, the *presumption of law* is, that the provision is satisfied. I say *presumption of law*, because it is put that it is proper to go to a jury; but that would be to send to a jury a presumption of law.—At the same time it is a presumption capable of being rebutted by evidence. The evidence, in this case, may be drawn from the language of both gifts. The plaintiff must shew, he meant the gift to subsist. With respect to the treaty, the use of it in evidence is to shew the testator's intention. The struggle, on the part of *Ellison* the father, is whether he can get more than £5,000 for his son, after getting an undertaking from the father that he should have something more. *Buck* says Mr. *Cookson* would not engage for any specific sum; he has stated the conversation a little too widely, though not for the purpose of surprise, into "equal or nearly equal," which is going beyond the point of the conversation. The furthest engagement does not contradict the latter *in toto*; it does not amount to an engagement that the future sum shall be *equal, or nearly equal*; it leaves it with the idea, that it was possible or probable that it would be equal, or nearly equal: had the father in his letter left it thus, it might have introduced the whole,—but he goes on "that he  
 told

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told him his *plan, which was to be executed by his wife.*" This is agreeable to the terms of the codicil, which were, to leave the property bound, as far as £40,000, but refers, for every thing further, to what the savings may produce, and which were to be disposed of by his wife.—This is the plan he alluded to. With respect to the rule of law, I think, if neither the rule itself, or the mode of rebutting it, had ever prevailed, it would have been as wise; but, as it is, I must admit that such a presumption exists; and though it is argued, testators may not know it, yet I think, if there is such a presumption, the subject is bound to know it. And, in the present case, I think the probability is, that the testator had some knowledge of the rule (*a*); all the argument therefore must turn on the validity of the rebuttal. It is argued that he had given his married daughter £5,000, that, by his will, he gave his sons £10,000 each, his unmarried daughters £5,000. From the conversation, it may be drawn, that he hoped the surplus would be divided in much the same proportions; in which case, the daughter, who was the subject of it, would have equal, or nearly equal to the fortune given on her marriage. It was a hope of an uncertainty: to have held it out as an event that was certain would have been an inaccuracy. I think the letter points this out, as he had pointed out the fund from which the uncertain sum was to arise. To apply this to the general rule, the conversation ought to shew that he meant the gift to be a subsisting gift: the expression, here, is only as to what he hoped would be administered to her through the organ of her mother: if he had referred to the gift in the will, the conversation would have been applicable to the whole sum in the will, which could not have been altered. But my opinion is that the reference, in the conversation, was sufficiently clear to confine it to that part of her fortune which she was to receive otherwise, and where I hope this mistaken mode of seeking it will make no difference.

*Decree affirmed (b).*

(*a*) Lord Eldon has upon this expressed himself as follows: "In the case of *Ellison v. Cookson*, I had a large share. I knew some of the parties very intimately, and am perfectly sure that the case was rightly decided. But it was decided upon grounds of imputation as to what the testator thought, meant, and knew, as to the rules of law; which he could not understand even as to the terms in which they are expected. It was impossible

to talk to the family in terms which they could understand." 7 Ves. 517.

(*b*) The reader is particularly referred to Mr. Vesey's report of this case, for the fullest account of the arguments and judgments. Mr. Cox's being a very short note of the conclusion of the judgment only. For further references upon the subject and annotations to the case, vide ante, vol. ii. 307, upon the original hearing.

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## PHILLIPS v. GARTH.

**JOHN PHILLIPS**, Esq. made his will 28th December, 1775, and thereby, gave to his brother *William Phillips*, for life, his manor of *Blewberry*, (after the decease of the testator's father,) with divers intermediate remainders, with remainder for life to his brother *George Phillips*, and after giving some pecuniary legacies, gave and bequeathed all *the residue of his estate and effects whatsoever and wheresoever unto his executors, to be equally divided by them to and amongst his next of kin, share and share alike.*

The bill was filed by the nephews and nieces, and the representatives of a deceased nephew and two nieces of the testator, against the executors and against *George Phillips*, one of the brothers, and the representatives of a deceased brother and sister of the testator, insisting that all the next of kin, thirteen in number, were entitled to equal shares, *per capita*, of the personal estate of the testator.

The defendants, *George Phillips* and *Matthew Phillips*, the representative of the other brother *William Phillips*, (who was living at the testator's decease,) claimed the whole residue as next of kin to the testator, at the time of his decease.

*George Shakespeare*, the representative of a sister who died in the life-time of the testator, claimed one-fifth, as son of the deceased sister.

The cause came on in *Hilary Term*, Mr. Justice *Buller* sitting for Lord Chancellor.

Mr. *Mansfield*, Mr. *Mitford*, and Mr. *Hollist*, for the plaintiffs.

The construction depends upon a few words of the testator's will, who, after having made several specific dispositions of his property, gives the residue to his executors, to be by them divided to and amongst his next of kin, share and share alike. He left two brothers, one since dead, and ten nephews and nieces, four of whom claim as representing *Thomas* a deceased brother, and six as representing *Christiana* a deceased sister of the testator, and *George Shakespeare* who claims as representing his mother *Elizabeth*, another sister of the testator. The brother claims the whole, considering that *as next of kin* they are the persons entitled under the statute of distribution; but, if they are not solely entitled, still that the distribution ought to be *per stirpes*, therefore that four of the plaintiffs should have but one-fifth share, and six of the plaintiffs another fifth share, and themselves and *George Shakespeare* one-fifth each. In this latter claim *George Shakespeare* also concurs.

In Court, *Hilary* term, Mr. Justice *Buller* for the Lord Chancellor.

Lincoln's-Inn Hall, 10th March.

Gift of residue to be divided among next of kin, share and share alike, shall be divided among surviving brothers, nephews and nieces, (representing deceased brothers and sisters,) *per capita not per stirpes.*

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v.  
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The question is, who are entitled to take; and, on the part of the plaintiffs, we contend that the residue is to be divided among the same persons who would have taken had no disposition been made; but that they are to take equally, and not in the shares marked out by the statute.

Questions of this sort have so often arisen, that there can now be no doubt about the construction of the words "next of kin." Most of the cases have the word "relations," as *Thomas v. Hole*, Forr. 251. and *Green v. Howard*, (ante, vol. i. page 31.) in both which cases the word *relations* was held to be the same as *next of kin*. The words *next of kin*, therefore, in this case being tantamount to *relations*, must have the same construction. The brothers of the testator put a new construction on the words, and contend that they were the next of kin at the time of the testator's decease. But the testator could not mean to give the residue to the brothers only: he clearly meant more than two persons, and that it should be divided among a number. The 6th clause of the statute of *James* provides who shall be entitled to call for distribution, the next of kin and creditors, where *next of kin* cannot exclude nephews and nieces, and it is clear then the only question is how it shall be divided. The words *share and share alike* exclude the idea of its being in fifths. The case of *Thomas v. Hole* seems provided to decide the present; there the gift was to the relations of *Ann Hole*. It is a case in point, except that here the words are *share and share alike*, and there they were *equally to be divided*. The words *share and share alike* were in the case of *Green v. Howard*, though they are omitted in the report. *Goodinge v. Goodinge*, 1 Ves. 231. *Whithorne v. Harris*, 2 Ves. 527.

Mr. Solicitor-General, for the defendant *George Shakespeare*.—We contend that the division should be *per stirpes*, and the words *share and share alike* are to be referred to the statute for their interpretation.

There is a considerable difference between the words being "*relations*" and "*next of kin*." Where the word used is *relations*, the Court only uses the construction to bound the extent of the word *relations*, but where the testator uses the words *next of kin*, he means the persons described by the statute, and that it should be divided in the same manner as it is given there. Suppose the brothers are not to take all, then the brothers and children of deceased brothers and sisters are to take *share and share alike*. The provision made in the statute is one-third to the wife, and the remainder by equal portions to the children or persons representing those who are dead, or, if no children, to the brothers and sisters, and the children of deceased brothers and sisters. The construction of the words "in equal portions" is *per stirpes*; that is, an equal proportion to each class, all of which classes form the next of kin. In the 6th and 7th clauses of the statute equal division is applied in this sense, and the statute accounts the fortune

tune to be equally divided when it is divided *per stirpes*. Immediately after the statute this must have been the construction. If the testator gives it to his brothers and sisters and the children of those deceased to take *per capita*, he does not say to take as next of kin, *Blackler v. Webb*, 2 P. W. 383.

In *Green v. Howard*, a certain sum was to be divided in proportions of a certain amount; and it was contended that he meant persons more numerous than the next of kin, as otherwise they would not exhaust the fund, they not being to take more than £250 each. Where a testator gives in the words of the statute, it is fair to argue he meant they should take in the proportions of the statute; but where he uses the words *relations*, it does not follow that he means the legatees to take in the character of the statute.

As to the brothers only being intended to take, the words "*next of kin*" must mean, in some sense, all the persons within the statute; but if these words will comprehend the children of deceased brothers and sisters, they are not to be taken in the narrow sense contended for against me.

Here the intention is clear that they shall take as next of kin under the statute.

Mr. Attorney-General, for the brothers of the testator.—We contend, 1st. That the brothers are exclusively entitled. 2d. That if this be not so, the division must be in the mode prescribed by the statute.

1st. It is familiar to consider those who are the nearest living as next of kin: not to consider those who are so by representation, of which many people know nothing at all. There is no case where *next of kin* has been extended to *relations*, though the word *relations* has been bounded by the determinations to signify *next of kin*. In *Green v. Howard*, Lord Chancellor said the testator must know the word *relations* meant more than *next of kin*. 2d. The extending the words to taking *per capita* would be making the testator die intestate, which he certainly did not mean to do. It would be to extend words by construction, instead of bounding them, which has never been admitted. Here nobody can be let in, besides the brothers, without extending the words "*next of kin*." The substance of all the cases is to find out the persons who were intended by the testator to take.

Mr. Justice Buller stated the case.—It is laid down as clear, that if a testator uses technical terms they shall carry the interest, according to known rules; but this seems to be laid down too broad. In *Hodgson v. Ambrose*, (reported Doug. p. 337.) I laid down the rule somewhat differently, that where the testator uses only technical phrases, the Court is bound to understand them as such, because the Court cannot say that he did know their meaning;

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v.  
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ing; but, if the testator uses other expressions in other parts of the will, which shew he did not mean to use those phrases technically, then the intention must prevail.

Then if the words *next of kin* are technical words, in the present case they must prevail.

It is argued by the Attorney-General, that these words have a natural sense, different from that in which they are used in the statute of Distributions, and that their natural sense must prevail. But since the statute of *James* these words have had a particular sense. Every inference that can be drawn is that the testator used them in the sense that every one understands; and if it does not appear that he used them in some other, that sense must prevail. It is suggested that he meant by next of kin his two brothers; but, having just before mentioned them, he would have named them as his said brothers, not used the term *next of kin*. In the cases determined the word *relations* has been considered as a vague word, and therefore to be explained by *next of kin*. It is true it has been contended that these mean nearest relations, but that it cannot be so has been determined in *Whitborne v. Harris*.—Then those must take whom the statute points out, but the question is, in what shares.—If it had pleased the Court originally to say that next of kin should take in the same manner as under the statute, I should not have objected to it, for it seems to me they should take *per stirpes*. But in *Blackler v. Webb*, 2 P. W. 383. the Lord Chancellor was at first of opinion that they should take *per stirpes*, but said afterwards they could not do so, because the testator's daughter *Webb* was living, and so her children could not represent her; and to determine that the grand-children should take *per stirpes* would be going too much out of the will; and therefore, though he had at first a strong inclination the other way, he thought that, where the words were plain and sensible, the Court could not reject them.

It is a very probable ground of the bequest here to the next of kin, that the testator did not mean to give the executors more than he had done, having given them very amply before. It is agreed if he had given to his next of kin by name, they must have taken *per capita*; then the question is, whether calling them *next of kin* is not equal to naming them.

I cannot distinguish this case from that of *Thomas v. Hole*. That case is in point, except that there the word is *relations*, which being to be construed *next of kin*, makes it this case. The second resolution in that case is, that as the testator had directed it to be divided equally, Lord King said he could not order it to be divided otherwise. *Equally to be divided* is exactly the same as *share and share alike*. *Green v. Howard* is sufficiently stated in the report for the purpose intended; the only question was whether *relations* meant the same as *next of kin*. The facts required no more: the persons to whom the Lord Chancellor decreed the payment were all in equal degree.

The

The whole of the residue must be divided into thirteen parts, of which the brothers, nephews, and nieces, are each to take one share.

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v.  
GARTH.

The defendant, *George Shakespeare*, presented a petition to the *Lord Chancellor*, upon which the cause came on to be reheard at *Lincoln's-Inn Hall*, on the 10th *March*.

The argument in general was much to the same purport as before, but *Mr. Lloyd*, in support of the petition, cited the cases of *Car v. Bedford*, 2 Ch. Rep. 77. *Roach v. Hammond*, Pre. Ch. 401. and *Hands v. Hands*, at the Rolls, 24th *January*, 1782, where *J. Hands* made his will, and thereby appointed his wife executrix, and gave her all his estate, subject to the payment of debts and legacies, for life, and then declared his will to be that she should give the whole, (except £400) to and among his relations. The Master of the Rolls held that the wife had no discretion, except as to the distribution, and that the next of kin were entitled.

There was no petition presented by the brothers; but *Lord Chancellor* leaning much in favour of their claim, as next of kin at the death of the testator, ordered the cause to stand over, in order for them to present a petition of re-hearing (a).

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But the cause was afterwards compromised, the parties dividing the property among them *per stirpes*.

See the case of *Edge v. Salisbury*, Amb. 70.

(a) *Lord Eldon*, in speaking of *Mr. Justice Buller's* decision, observed, that he always had great doubt upon it; and added, that *Lord Thurlow* doubted it upon this very technical reasoning, to which his Lordship was much addicted in the construction of these instruments; that next of kin being the only description, without the addition (which is in the statute) of those who represent them, the children of the deceased brothers and sisters ought not to take under that bequest, 14 Ves. 385. Accordingly, in the case of *Smith v. Campbell*, Coop. Ch. Rep. 275, Sir *W. Grant* determined that, under the words *nearest surviving relations*, surviving brothers and sisters were entitled, to the exclusion of nephews and nieces of a deceased brother. The cases upon the subject are collected in *Mr. Cox's* note to *Blackler v. Webb*, 2 P. W. 386, and *Serjeant Williams's* note to *Hole v. Thomas*, Forr. 251, from whence it appears, that though the words rela-

tions, next of kin, descendants, &c. are confined to such persons as are within the statute of Distribution, yet the shares and proportions in which they are to take, must be regulated according to the intent and construction of the will, and not according to the statute. See, in the present publication, *Green v. Howard*, ante, vol. i. 31. *Malcolm v. Martin*, ante, 50. *Rayner v. Mowbray*, post, 234. *Butler v. Stratton*, 366. *Masters v. Hooper*, post, vol. iv. 207. That, *prima facie*, a bequest by a husband to his next of kin does not include the wife; nor a similar bequest by a wife, under a power, include the husband; also that his marital right, as administrator by law, is excluded by a limitation in a settlement to the next of kin of the wife, vide *Watt v. Watt*, 3 Ves. 244. *Griffin v. Nanson*, 4 Ves. 344. *Garrick v. Lord Camden*, 14 Ves. 372. *Anderson v. Dawson*, 15 Ves. 537. *Bailey v. Wright*, 18 Ves. 49, affirmed on appeal, 1 Swanst. 39.



1790.

SAMUDA v. FURTADO.

Lincoln's Inn  
Hall, 12th March.  
Plea of payment  
of a sum into the  
Ecclesiastical  
Court, to prevent  
a commission of  
appraisement,  
and accepted, and  
a receipt given,  
disallowed as a  
plea in bar to a  
suit, it not shew-  
ing that the party  
had no further  
demand.

A defendant to  
a bill of revivor  
cannot plead to  
that suit a plea  
which has been  
pleaded by the  
original defend-  
ant, and over-  
ruled.

THE plaintiffs were the representatives of *Isaac Lusitano de Pinna* (who in his life-time had been discharged under an insolvent debtor's act) and *Maria Agnes de Pinna*, his first wife; also of several persons of the family of *Monforte*, and the representatives of *Moses Alvarenga*, who was assignee of the effects of *Isaac Lusitano de Pinna*, as an insolvent debtor. The defendants were the representatives of *Daniel de Flores*, and also of other persons of the family of *Monforte*.

The original bill had been filed in the year 1734, by *De Pinna* and his wife, against *Flores* and others, claiming in the right of the wife the payment of some sums of money due to her from estates which *De Flores* represented. This cause had, at several times, abated by the death of parties, and been revived; and, in 1743, *De Pinna*, the plaintiff, had been discharged, as an insolvent debtor, and *Alvarenga* had been appointed his assignee; upon which a supplemental bill had been filed, and several further proceedings had been had, upon which the present bill of revivor and supplement was filed.

To this bill the defendant pleaded, that on the 13th *January*, 1753, after the death of *De Flores*, by a decree of the Prerogative Court of *Canterbury*, it had been decreed that a commission of appraisement and monition should issue, on affidavits of *De Pinna* and *Alvarenga*, of a debt due from *De Flores* to the estate of *De Pinna*, to the amount of £585. 5s. for which he had received no satisfaction; and that afterwards there was an appeal from that decree by the executors of *De Flores*, and the decree affirmed upon that appeal; and that afterwards the acting executors of *De Flores* tendered and left in the registry of the Ecclesiastical Court the sum of £585. 5s. in full satisfaction of the debt sworn to be due from the estate of *De Flores* to that of *De Pinna*, and that *Alvarenga*, by his proctor, applied for and received that sum, and gave a receipt for the same as follows: "*Franco and Franco against Alvarenga.—Received this 23d December, 1754, of Mr. William Legard, Mr. Peter St. Eloy, and Mr. Henry Stevens, deputy-registers of the Prerogative Court of Canterbury, the sum of £585. 5s. being the same sum which, on the 10th day of July last, was tendered by Mr. Henry Farrant, proctor in the said cause, for Ab. Franco and Jacob Franco, executors of Daniel de Flores, otherwise De Prado, deceased, in full satisfaction of a debt sworn by Isaac Lusitano de Pinna and me, the underwritten Moses Alvarenga, in our joint affidavit exhibited in the said cause, to have been due from the said Daniel de Flores, otherwise De Prado, to the said Lusitano de Pinna, and assigned over, in pursuance of an act of insolvency, to me the said Moses Alvarenga, for the use of himself and others, the creditors of the said Isaac Lusitano de Pinna,*

*Pinna*, and which being, on that day, refused to be taken by my proctor, was there left in the said registry by the said *Henry Farant*, as a deposit for the payment of the said debt, and which since, to wit, on this day, has been, at my petition, decreed to be delivered and paid out of the said register to me, the said *Alvarenga*; I say, received of the said deputy registers the said sum of £585. 5s. pursuant to the said order or decree of the said court, in full of the said tender and deposit so made in the said registry. *Moses Alvarenga*.”—And the plea further stated, that *De Pinna* and *Alvarenga* had no claim on the estate of *De Flores*, save in the right of *Maria Agnes de Pinna*, the first wife of *Isaac Lusitano de Pinna*, for which relief was sought by the original bill.

A plea, to the same purpose as the present, had been put in by the *Franco*s, as executors of *Daniel Flores*, in a former stage of the cause, and was over-ruled 23d November, 1757.

Mr. *Mitford* and Mr. *Steele*, in support of the plea, contended that the £585. 5s. was taken out by *Alvarenga* in full of his and *De Pinna*’s claim upon the estate of *Flores*, as representing that of the *Monfortes*; that the tender being in full satisfaction, the receipt of it must be so likewise; that it was therefore as good as any other release, and must be a bar to any suit by the representatives of *De Pinna* and *Alvarenga*, who had no other claim on the estate of *De Flores* but as representing *Maria Agnes de Pinna*.

Lord Chancellor said, he doubted whether it was possible to put this interlocutory proceeding on a foot with their having filed a bill and obtained a judgment for this debt, which would have been in full. If they had made this claim *in foro contentioso*, and recovered this sum, they could not possibly have come with any further demand, but must have set forth some fraud, mistake, or surprise; but an interlocutory proceeding can never be brought up to a judgment in the cause.

He also thought that a defendant in a bill of revivor could not plead a plea which had been before pleaded by the original defendant, and over-ruled.

Plea over-ruled, and ordered to stand for an answer (a).

(a) So in *Gage v. Buckley*, 2 Atk. 215. a plea of a foreign sentence was ordered to stand for an answer with liberty to except, as being only in a commissary Court, which is of a political nature, for determining disputes

relating to French actions. As to pleas of sentences of courts having full jurisdiction, vide Redesd. Tr. on Pl. 208. Beames’s Elements, 201. and the arguments in *The Duchess of Kingston’s case*, 20 How. St. Tr. 355.

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v.  
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S. C.

2 Cox, 224.

2 Dick. 711.

Lincoln's-Inn  
Hall, 13th March.  
Goods sequestered on mesne process not to be sold.

## HALES v. SHAFTO.

**T**HIS was a sequestration upon mesne process. Mr. Solicitor-General moved for leave to sell the goods taken on the sequestration: but Lord Chancellor refused the motion, a sequestration on mesne process being only to found the further process of taking the bill *pro confesso*. *Gibson v. Scevenston*, 1 Vern. 247. and *Desbrow v. Crommie* (a), were referred to.

See *Wilcocks v. Wilcocks*, Ambl. 421 (b).

(a) Bunb. 272.

(b) This motion had been previously made before the Master of the Rolls, and refused, 1 Ves. jan. 86. His Honor doubting whether any sale could be made further than to pay the expences. The decisions upon this subject are extremely contradictory. In *Simmonds v. Lord Kinnard*, 4 Ves. 735. the subject was much discussed, but Lord Rosslyn did not decide the question, whether a sequestration on mesne process could be extended further than to pay the expences. But in *Shaw v. Wright*, 3 Ves. 23, which occurred a short time previous to it, his Lordship, thought that the Court might sell perishable commodities, rents paid in kind, or the natural produce of a farm, under a sequestration. This decision is entirely at variance with the case of *Wilcocks v. Wilcocks*, cit. sup. In the case of *Rowley v. Ridley*, 2 Dick. 622. the Reporter gives a very elaborate account of the nature of this process; and draws a distinction between the two sorts of it, viz. that on mesne process, and the other, which is for a

duty, viz. the payment of a sum of money under an order, or for the execution of a decree. It appears from consideration of the various authorities, that the sequestrators in the former have no power either to remove or to sell the goods, as they are only retained in the nature of a pledge to answer the contempt, the process being only to ground further proceedings upon, and merely to make the defendant come in and answer, *Desbrow v. Crommie*, *Gibson v. Scevenston*, cit. sup. *Heather v. Waterman*, cit. 2 Dick. 625. Accordingly in *Knight v. Young*, 2 V. & B. 184. the Court refused to order execution of a sequestration upon mesne process. But where the sequestration issues for non-payment of money, or for not performing a decree, the goods sequestered, may be sold upon notice given, *Cavil v. Smith*, post, 361. *Mitchell v. Draper*, 9 Ves. 208. see further upon the subject of sequestration, *Walker v. Bell*, 2 Mad. Rep. 21. *Dunkley v. Scribner*, ib. 443. *Louten v. The Mayor and Commonalty of Colchester*, 2 Meriv. 395.

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Lincoln's-Inn  
Hall, 14th March.

The practice of a court of law, compelling a plaintiff on a bond not to take execution beyond his real debt, does not oust the jurisdiction of this Court in awarding an injunction. Demurrer to a bill, on that ground, over-ruled.

## Codd v. WODEN.

**C**ODD, the plaintiff, being indebted to several persons, by deed in 1769, assigned over real and personal estate to trustees, in trust to pay to himself and his wife an annuity, and out of the surplus to pay debts, with the interest then due proportionably, but the debts to bear no subsequent interest; and the creditors covenanted not to prosecute any suits for their debts, and to pay the surplus to Codd. The defendant had not signed this deed, but had accepted payments under it; and after the account taken, payment of the debts, with the interest due at the time of making the deed, and the actual payment of the surplus, the defendant brought an action on the bond, in order to recover the subsequent interest; on which the plaintiff filed his bill for an injunction,

injunction, insisting that the defendant having asked and received payment under the deed, was bound by it: to this bill the defendant put in a general demurrer.

Mr. *Lloyd*, in support of the demurrer insisted, that the deed being purely for payment of the debt and interest previous to its date, did not affect the subsequent interest, for which only they had brought their action, and that the courts of law would prevent their taking out execution for more than the actual debt, although they were obliged, in order to recover that, to bring their action upon the bond; that this bill was in fact only a bill for a discovery whether the defendant here had agreed only to take interest to the time of the deed.

*Lord Chancellor* over-ruled the demurrer as too wide, because, although the court of law would prevent their taking out execution beyond their just debt, that did not take away the jurisdiction of this Court as to an injunction (a).

(a) So also, though a Court of Law permits a plaintiff to declare upon a lost bond, that does not exclude the jurisdiction of a Court of Equity. As to which, vide *Atkinson v. Leonard*, post, 218, and the Editor's note.

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## (n) LITTLEHALES v. GASCOYNE.

THE defendants, executors of the late Sir *Crisp Gascoyne*, having kept very large sums of money in their hands ever since his decease in the year 1761, the *Lord Chancellor*, on the 3d of *February* last, ordered them to pay interest for the same, saying that an executor's paying or not paying interest depended on its being necessary for him to keep the money to answer the exigencies of the testator's affairs or not; but that where he held the money longer than was necessary he must answer interest. And the cause coming on again this day, and the balances appearing very large, and great delays, and the interest exceeding the principal, they were ordered to account for the same (a).—Mr. *Hardinge* pressed that, one of them having become insolvent, the other executor might answer the sums come to his hands, charging him with being a partner in the delay; but the *Lord Chancellor* refused this as never done, except where executors joined in receipts, or did other joint acts, but ordered them both to be liable to the whole costs (b).

Lincoln's-Inn  
Hall, 14th March.

Executor keeping the money of testator longer than the exigencies of his affairs require shall pay interest. But one executor shall not be answerable for the sums come to the hands of another, unless they have done joint acts: but each shall be liable to the whole costs.

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(n) *Francklin v. Frith*, post, 433.

(a) The cases in which executors, &c. have been charged with interest, are collected in a note to the case of *Newton v. Bennet*, ante, vol. i. 359.

(b) Vide, as to this, *Sadler v. Hobbs*, ante, vol. ii. 114. and *Scurfield v. Howes*, post, 94.

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## (o) MUSSEL v. MORGAN.

Lincoln's-Inn  
Hall, 17th April.

A decree, though  
obtained by  
fraud, cannot be  
set aside, by peti-  
tion.

**T**HIS was a petition, by *Ebenezer George Nicholas Bryan Mussel*, to have the decretal order pronounced in this cause the 18th Feb. 1775, discharged, as obtained by collusion, and for other purposes.

The petition stated, amongst other things, that *John Curtis*, as next friend to the plaintiff, filed his bill in a name, he being then an infant, against the defendant *Morgan* and others, stating the will of *George Mussel*, petitioner's grandfather, whereby he "devised to his wife, *Elizabeth Mussel*, certain messuages in *Cullum Street* and elsewhere for life, remainder to *Ebenezer Mussel* (petitioner's father) for 99 years, if he should so long live, remainder to the heirs of the body of his said son *Ebenezer*, lawfully begotten; and declared it to be his will that the premises should not descend entirely to the eldest son of his said son *Ebenezer*, if he should have any other child or children of his body, lawfully begotten, living at the time of his decease; but that his son *Ebenezer* might, at any time during his life, by his last will and testament in writing, or by any other deed or writing by him to be executed in the presence of three or more credible witnesses, devise, limit, direct or appoint the said messuages, &c. unto or for the benefit of all his children as should be living at his decease, and to the several and respective heirs of their bodies, lawfully issuing, in such parts and proportions, and in such manner as his said son *Ebenezer* should think fit: and if it happened that his said son *Ebenezer* should die without having made any such will or disposition of the premises, then his will was, that the said messuages, &c. after the several deceases of his said wife and son, should come to all and every the sons, if more than one, of the body of the said son, to be equally divided amongst them; and if there should be but one son, then he gave and devised the same to such only son, and the heirs of the body of such only son lawfully issuing, with divers remainders over in default of such issue;" and stating, that about the year 1733, *George Mussel* died, leaving his wife and son surviving him; and the wife entered, and died in 1741; that *Ebenezer*, petitioner's late father, then entered, and died about 1764, without having executed his power of appointment, leaving *Sarah*, the petitioner's mother (then the wife of the defendant *Gretton*, and since deceased) his widow, and the petitioner and *Elizabeth Morgan*, (late wife of defendant *Morgan*, and daughter of the said *Ebenezer* by his former wife, and also since deceased) his only children; and that on the death of *Ebenezer* his father, the petitioner, by virtue of his grandfather's will, hoped an entry would have been made for him, and the rents received and laid out for his benefit; but the bill charged, that the defendant *Morgan* had

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(o) *Bradish v. Gee*, Amb. 229.

got

got into possession of the premises under pretence of a settlement on his marriage with the daughter of petitioner's late father; and the bill therefore prayed, that the defendants might produce all deeds, instruments, and memorials in writing relative to the estate, and might account for rents, &c. and that what might be coming from the same might be laid out for the plaintiff's benefit until he should attain 21, and then the funds should be assigned to him; and for a maintenance in the meanwhile: that the defendants put in their answer; and particularly the defendants *Thomas Wilkins Morgan*, and *Elizabeth Mary Wilkins Morgan*, his daughter, stated, that in the year £1752, a marriage being proposed between the defendant, *Thomas Wilkins Morgan*, and *Elizabeth*, then the only daughter of *Ebenezer Mussel*, defendant informed *Ebenezer* that he was possessed of an estate of £2,000 *per ann.* given him by his grandmother, on condition that he should not marry any woman with a less fortune than £4,000, and that *Ebenezer* represented that his daughter would be entitled to about £1,000 *per annum* real estate, and that he meant to give up about £800 a year: and proposals having been made, a settlement was entered into, by which *Ebenezer* and *Elizabeth Mussel* conveyed the estates devised by said *George Mussel* to a trustee, in order that a recovery might be suffered, and the premises settled to the use of *Ebenezer* and his heirs till the marriage, remainder to trustees for 99 years, if *Ebenezer* should so long live, to raise an annuity for him, and suffer the defendant to receive the surplus rents for life, remainder to defendant *Thomas Wilkins Morgan* for life, *sans* waste, remainder to the wife for life, remainder to the issue of the marriage, remainder to the wife in fee; and *Ebenezer*, thereby released the power of appointment; that the recovery was accordingly suffered, and that there being some doubts about the construction of testator's will, in case *Ebenezer* should have any after-born child, *Ebenezer* gave defendant, *Thomas Wilkins Morgan*, a bond, in the penalty of £8,000, to pay the sum of £4,000, in case he should have any other child besides the said *Elizabeth*; that *Thomas Wilkins Morgan* entered into possession of the premises, and that defendants *Thomas Wilkins Morgan*, and *Elizabeth Mary Wilkins Morgan* (his daughter by said *Elizabeth*, his wife) claimed by the settlement and recovery; that the defendants, *Thomas Wilkins Morgan*, and *Elizabeth Mary Wilkins Morgan* (by her next friend) filed their bill in 1769, against the defendant *Gretton*, and *Sarah*, his wife (widow and executrix of *Ebenezer Mussel*) stating the settlement, and insisting that, in case the petitioner was entitled under the will of *George Mussel* to the estates in question, the defendants, the *Grettons*, ought to make them satisfaction for £4,000, and for two legacies released to said *Ebenezer Mussel* by said *Elizabeth* by the marriage settlement, out of the real and personal estate of *Ebenezer*; and praying that the settlement might be established, and that the *Grettons* and the plaintiff might be restrained from

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from bringing any ejectment for the recovery of the premises ; but if the Court should be of opinion that the settlement was void, then praying an account, and that the bond and legacy might be paid.—That the causes were heard 15th *Feb.* 1774, before the then Master of the *Rolls*, when his Honour ordered that the petitioner's bill should be retained for 12 months, and that he should be at liberty to proceed at law for recovering possession of the estate in question : and in default of proceeding, his bill should be dismissed with costs ; but in case he should proceed to trial, his Honour reserved costs and further directions till after the trial, and the other cause was to stand over in the mean time ; that in pursuance of this order an ejectment was brought by the plaintiff in the *King's Bench*, to which defendant *Morgan* was made a defendant, and the same was tried at the sittings in *London* after *Easter* 1774, before Lord *Mansfield*, and a verdict found for the plaintiff, subject to the opinion of the Court, on a case which was reserved, with liberty to enter up a verdict for defendant, if the Court should be of opinion the plaintiff had no right to recover : that the case stated the will of *George Mussel*, his death, the entry and death of his widow, the entry of *Ebenezer*, and his having issue by his then wife, *Jane Elizabeth*, born during the life of testator's widow ; the indenture of lease and release and recovery ; the marriage of defendant *Morgan* ; and that *Ebenezer* afterwards married said *Sarah* (then *Sarah Stevens*) and had issue by her the petitioner ; and the death of *Ebenezer* : that defendant *Thomas Wilkins Morgan's* wife died in 1765, leaving issue two daughters, one of whom was since dead : and that defendant *Morgan* claimed under the settlement and recovery, and the petitioner under the will of his grandfather ; that the case was argued in *Trinity Term* 1774, and then stood over for further argument in *Michaelmas Term* ; in which term (as petitioner had lately discovered) a rule was made for entering judgment for the defendant ; that the causes having been set down on the equity reserved, came on at the *Rolls* 15th *February*, 1775, when his Honour ordered the petitioner's bill to be dismissed without costs, and established the settlement in the second cause ; that the petitioner attained 21 years of age 28th *March*, 1785, but had been obliged to reside abroad since that time ; that the petitioner, 4th *April*, 1789, made an actual entry on the premises, and brought an ejectment to recover the same : which coming on to be tried, it appeared that the demise was laid prior to the entry, on which account the nominal plaintiff was nonsuited ; that *Elizabeth Mary Wilkins Morgan* having attained her age of 21, *Thomas Wilkins Morgan* and she, as of *Trinity Term* 1777, levied a fine of the premises ; and afterwards, she having intermarried with *Ely Bates*, they, about *May* 1789, filed their bill against the petitioner, stating that the case had been argued in *Trin.* 1774, and again in *Mich.* 1774, when judgment was given for defendant *Morgan*, and praying to have the benefit of the decree of  
15th



15th Feb. 1775, and to be quieted with respect to plaintiff's claim, and for an injunction to restrain the petitioner from proceeding at law. The petition further stated, that the petitioner was ignorant of the rule for entering judgment for defendant *Morgan*, in the action brought in 1774, or of the decretal order in 1775, till after he had brought his ejectment in 1789; but had found, on searching the office of the Clerk of the Rules, that the same had been by consent of counsel for petitioner, as lessor of the plaintiff, and of said defendant; and that, from other circumstances, he is satisfied that the judgment and decretal order were obtained by collusion between said *Curtis* and defendant *Morgan*; and that he understands that, on the arguments in *Trin.* Term 1774, the Court had great doubt as to the construction of the will, and directed counsel, in the interim between that and the second argument, to look into cases: and that in the meantime the suit was compromised between *Curtis*, his next friend, and defendant *Morgan*, upon the terms that judgment should be entered up for the latter, and that he should pay the costs, and that the rule was obtained in consequence of that agreement; and that he apprehends that the defendant *Gretton* connived thereat, as, in case petitioner obtained judgment in his favour, *Gretton* and his wife might be liable to pay the defendant *Morgan* the sum of £4,000, and other sums, with interest, out of the assets of the petitioner's father, *Ebenezer Mussel*; the petitioner therefore prayed, that the decretal order might be discharged, and the petitioner be at liberty to apply to the Court of *King's Bench* to have the judgment set aside, and the case re-argued; and that the defendant *Morgan* might be ordered to consent thereto, and the trial in the ejectment stayed till after the judgment of the Court of *King's Bench* should be obtained on the case.—The petition was supported by affidavits.

Mr. *Mitford* and Mr. *Hollist*, in support of the petition, argued that this was the proper way of getting rid of the decree; that in the present case it could not be by bill of review, because the decree was not enrolled.—That it might be by re-hearing, but that was prevented by the judgment in the *King's Bench*.—Though no case had directly decided that a decree could be set aside on petition; yet in *Sheldon v. Fortescue*, 3 P. W. 104. the Lord Chancellor admitted, that even a decree, much more an interlocutory order, if gained by collusion, may be set aside on a petition, *a fortiori*, by bill. But in all the cases where there has been a second bill, there has been more to do, not merely to set aside what has been done. Although the present case is in a state for a rehearing, that could go no further than the judgment on the record, and the collusion could not appear; and we cannot apply, without leave, to the Court of *King's Bench*, to set aside their judgment. If a third person is injured by collusion, he may file his bill; but where it is the plaintiff, he can only apply by petition; and even in

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in the case of a third person, it must be where he has an equitable right. The present petitioner having a right to rents and profits, his bill was retained only on account of his being an infant; but would not have been so, had he been adult, without trying his title at law; therefore at present, under a new bill, he must be put to a fresh ejectment, to find the same facts which are found already; and upon which, by removing the judgment and decree out of the way, the question of the construction of the will may be argued, without further expence of a new finding of the same facts. There is a case in 1 P. W.\* where a decree was pleaded to a fresh bill, and the plea over-ruled. In a case in † Atkyns, Mr. Yorke lays it down that a decree may be set aside on petition (a).

But *Lord Chancellor* refused the prayer of the petition, saying there was no instance hitherto of its being done, and that he could not see a reason why it should not be by an original bill, in the nature of a bill of review. Either there is enough before the Court already for it to determine upon, or not; if there is, it may be done by a rehearing; if not, the new matter must be brought before the Court (b).

\* *Richmond v. Tayleur*, 1 P. W. 734.

† *Wortley v. Birkhead*, 3 Atk. 809. See the case of *Bradish v. Gee*, Amb. 229.

(a) This is not so.

(b) See, as to this, *Wortley v. Birkhead*, cit. ante, *Munaton v. Molesworth*,

1 Eden, 18. *Kennedy v. Daly*, 1 Sch. & Lef. 355. *Perry v. Philips*, 17 Ves. 173.

S. C.

1 Ves. jun. 132:

Lincoln's-Inn  
 Hall, 20th April.

Bankrupt's estate  
 shall pay interest,  
 when sufficient,  
 without breaking  
 in upon his allow-  
 ance.

*Ex parte MORRIS.*

THE bankrupt's estate being sufficient for the purpose, *Lord Chancellor* gave the creditors interest for such of their debts as bore interest; but said he would not have done so if it broke in upon the bankrupt's allowance. See *Bromley v. Goodere*, 1 Atk. 75 (c).

(c) The cases upon this subject are collected in a note to *Ex parte Champion*, post, 436.

EASTER

## EASTER TERM.

30 GEO. III. 1790.

## JONES v. JONES.

**T**HE testator devised lands, and also ordered his personal estate to be laid out in land, and settled to uses under which the defendant took an estate for life only, with remainder over; and appointed the plaintiff executor. The defendant possessed himself of the personal estate, and, amongst other things, of securities for money. The plaintiff filed his bill, and the securities were ordered to be deposited. Some of the debtors being desirous of taking up their securities,

Motion, that securities be delivered to the executor to receive the money, granted.

Mr. *Richards* moved, on the part of the plaintiff, that the securities might be delivered up to him, in order to receive the monies secured by them; which was slightly opposed by Mr. *Lloyd*, counsel for the defendant; but it was ordered, and that the plaintiff should deposit the money paid in the *Bank*.

## BUTLER v. EVERY.

**T**HIS was a bill by persons claiming as heirs *ex parte maternâ* of the late Sir *John Every*, Bart. stating that he died in the year 1779, intestate, but that *Edward Every* took possession of his estate, pretending to be heir *ex parte paternâ*.

To this the defendant pleaded that, after the death of Sir *John*, *Edward* entered, claiming as heir at law, and took the title of Sir *Edward Every*, Bart. and in *Michaelmas* Term, 1780, levied a fine of the lands in the county of *Derby* and elsewhere: the plea stated that the due proclamations were made, and that no claim was made in due time by the plaintiff. And it further averred that the fine was levied of all the lands which belonged to Sir *John Every*, and stated the death of Sir *Edward Every* in 1785, by which the estate had descended to the defendant.

S. C.  
1 Ves. jun. 136.  
Plea of a fine of lands in the county of *Derby* and elsewhere, with averment that it was of all the lands, sufficient, though it has no averment that the party had no lands but in *Derbyshire*.

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Mr. *Mitford* and Mr. *Johnson*, for the plaintiff, objected to the plea as insufficient, as not setting forth that fines were suffered of all the estates; the word *elsewhere* applying that the lands lay in other counties besides *Derbyshire*, and no fine being stated to have been levied in any other county, which would be necessary, as a fine

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fine levied in one county could not affect lands situate in another. That in this case Sir *John Every* had advowsons in gross; and that though the plea alledged entry, it did not alledge that there had been any presentation, without which there could be no seisin of the advowsons; therefore, the plea being entire, and being in part bad, must be wholly over-ruled.

Mr. *Mansfield*, for the defendant, in support of the plea, said the bill had not stated that there were any advowsons in gross; and that it could not be implied from the fine, which was only of general descriptions, that there were any; but that the plea averring that the fine was of all the lands of Sir *John Every*, that was sufficient, though it did not expressly aver that he had no lands out of *Derbyshire*.

And Lord Chancellor thinking this averment sufficient, and that he could not intend, from the fine alone, that there were advowsons in gross,

*Allowed the plea (a).*

(a) The Editor has searched the Register's book for some account of the plea which was put in by the defendant in this case, but unsuccessfully. There is an entry (Reg. Lib. A. 1789. fol. 98.) of its coming on, as mentioned in Mr. *Vesey's* report, to be argued before Mr. Justice *Buller*, and two Masters, sitting for the Lord Chancellor, when upon two formal objections being made to it, liberty was given to amend. There is also another entry, ib. fol. 614. which is evidently subsequent to the present case, but the Editor has not been able to find any in which the plea is set out. The Editor was the more anxious to obtain a sight of the plea, as according to both reports there appears to have been no direct averment of seisin; a circumstance which had been expressly determined by Lord *Hardwicke*, in *Story v. Lord*

*Windsor*, 2 Atk. 630. to be necessary; and the doctrine of that decision had been adopted by Lord *Rodesdale*, (Trea. 203. 3d edit. 206.) It seems therefore the more extraordinary, that the objection should have escaped his Lordship (who was here counsel for the plaintiff;) as well as the Court. In the subsequent case of *Page v. Lever*, 2 Ves. jun. 450. a plea of a fine was over-ruled, because it averred possession only, and not seisin, and in the late case of *Dobson v. Leadbeater*, 13 Ves. 230. a similar plea was over-ruled, as it only alleged seisin by way of argument; a direct positive averment of seisin being considered as indispensable. In both these cases however, liberty was given to amend; as to which, vide *Newman v. Wallis*, ante, vol. ii. 143.

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S. C.

1 Ves. jun. 143.

Devise of real and personal estate, to the wife for life, remainder to the testator's son R. R. and his issue lawfully begotten, to be

divided as he shall think fit; and if he should die without issue, remainder over, held to be an estate for life only, with a power, and the remainder over good.

HOCKLEY and Wife v. MAWBEY.

JOHN RUSSEL, by will dated 2d January, 1768, devised as follows; "I do hereby order and direct my executors hereinafter named to lay out the sum of £2,000 out of my personal estate, in the purchase of a freehold estate, within twelve months after my decease; and when the same shall be purchased,

I give,

I give, devise, and bequeath the same, and every part thereof, unto my wife *Rebecca Russel*, for and during the term of her natural life. Also I give and bequeath unto my said wife all those my freehold messuages in *Johnson's Court*, near *Fleet Street*, No. 2, 4, 5, 6, which were purchased in the name of my son, but are my property, as appears by a declaration of trust from him to me made; and also all those six messuages or tenements, being freehold, situated in *Raven and Sun Yard* in *Bermondsey* aforesaid, and the reversion of seven more there, which will descend to me in about twenty years: which last mentioned estate was likewise purchased in the name of my son, but are also my property, as appears by another declaration of trust from him to me made; to hold unto my said wife, all and singular the said premises for and during the term of her natural life: also, I give and bequeath unto my said wife all my leasehold estates for and during her natural life; and from and immediately after her decease, I give, devise, and bequeath the same, and every part thereof, unto my son *Richard Russel*, and to his issue, lawfully begotten, or to be begotten, to be divided amongst them as he thinks fit; and if my said son shall happen to die without issue lawfully begotten, my will is, that as well my present freehold and leasehold estates, as the estates hereby directed to be purchased, shall be sold, and the money arising therefrom shall be equally divided between my brother *Thomas Russel's* children, my sister *Willet's* children, and my sister *Parker's* children. And my will and desire is, and I hereby order and direct, neither the estate directed to be purchased, nor any of my present freehold or leasehold estates may be sold or disposed of during the life of my wife or her son; and all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, after payment of my just debts, funeral expences, and the above legacies, I give, devise, and bequeath the same, and every part and parcel thereof, unto my said wife, to and for her own use and benefit for ever. And I do hereby nominate, constitute, and appoint my said wife sole executrix of this my will.

*John Russel* died in *December*, 1770, *Rebecca Russel* survived him, and entered upon and possessed the estates, both real and personal, but never laid out the £2,000 according to the directions of the will, and died in 1780. Then *Richard Russel*, the son, came into possession, and died in the year 1784, having bequeathed his estates to the defendant *Mawbey* and others upon trust. He never had any issue.

The bill was filed by the plaintiffs, in right of the wife, who was the widow, and personal representative of *John Russel*, who was one of the children of *Thomas*, the brother of the testator named in the will, praying that the £2,000 might be answered out of the assets of *Rebecca*, and that the estates devised by the will to be sold, might be sold, and the produce thereof, and the £2,000, distributed amongst such of the children of the testator's brother  
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*Thomas*, and his sisters *Willet* and *Parker*, as were still alive, and to the personal representatives of those who were dead.

The decree directed, among other things, an enquiry whether the £2,000 had been laid out in land, according to the will; and also that the Master should enquire and state what freehold and leasehold estates the testator *John Russel* was seised and possessed of at the time of making his will.

The Master by his report, certified, that the £2,000 had not been laid out; that the testator had other freehold estates besides those specified in his will.

The cause came on now for further directions, when two points were made:

1st. Whether the words *present* estates, meant all the estates of which the testator was then in possession, or, the enumerated estates only.

2d. Whether the devise to the brother's and sisters' children was, or was not, too remote, as depending on the son's dying without issue.

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Mr. *Mansfield* and Mr. *Lloyd*, for the plaintiff, and for defendants in the same interest, contended, that by his *present* estates the testator must have meant all the estates of which he was then possessed. There is nothing to restrict the sense of the word *present*. It is contradistinguished to the estates to be purchased.

2dly. This is not an estate tail in *Richard*, but an estate for life. It is a contingency with a double aspect; to the issue, if any, but if he died without issue, then over. The words, *without issue*, must mean issue living at the death. This sense of the words, is aided by the subsequent words: for if he dies without issue, it is to be divided; *the division is to be at his death*, with the additional provision, that it shall not be during the life of testator's wife. The division among the brother's and sisters' children, must be equal. If there was one child only, that child would take. *Davy v. Hooper*, 2 Vern. 665. *Madoc v. Jackson* (ante, vol. ii. p. 588.) *Wilson v. Vansittart* (Ambl. 562.)

Mr. *Solicitor-General* and Mr. *Selwyn*, for defendants.—By the words *present* estate, he must mean the enumerated estates, which he has given to the wife for life. He had other estates, of which he made specific devises in form; and he had estates, which he meant to be subjects of the residuary devise. He certainly meant the word *present* to be contradistinguished, not to the estate to be purchased only, but the estates not enumerated.

2dly. Then the gift over, upon dying without issue, is too remote, being after an estate tail. It cannot be contended, that *issue* here meant *children*. The testator was clearly aware, that it had a more extensive sense, and clearly meant the brother's and sisters' children



children should not take, but in a more remote event. Suppose the son had left no child, but had left grand-children, or great-grand-children, certainly they would have been objects of his power, and he might have appointed among them all. Then the issue, though ever so remote, being within the power, these words cannot be restrained to mean children only. There is no case where a remainder has been held to be good, after the word *issue* generally. The words used here, are not satisfied by saying, he has a life estate, with power to dispose, for he must take an estate tail; and the power given him to divide, will not prevent his taking an estate tail. Here are no words to restrain the issue, to issue at the time of his death, as there have been in all the cases when such construction has been given, such as the word *leaving*, &c.

*Lord Chancellor.*—The principal question is, what estate the son took in the enumerated estates: and I think the testator intended, and has expressed his intention of giving a contingency with a double aspect, in one event, a gift to the children of the son, if he should have any, and if he should not have any child, that then the estate should be sold for the purposes in the will. He did not mean the estate to go as an estate tail, but that the children should take distributively; in which case, they must take as purchasers; and the consequence is, that *Richard* took only an estate for life (a). He had a power to divide; but if he did not so, there was an interest in the children that would entitle them to an equal division (b). It is observed, that if he had no children, it would go to grand-children; it would so, but only as descriptive of his power: in order to take, they must be alive at the death of *Richard*; it is not sufficient to say that they are the immediate descendants of *Richard*, to make them take under the estate tail.

(a) There have been several cases in which words which would otherwise have been words of limitation, have been holden to be words of purchase, in consequence of there being a direction that the heirs or issue, &c. should take as tenants in common, or in some mode incompatible with the regular course of descent, *Doe v. Laming*, 3 Burr. 1100. 1 Bl. Rep. 265. *Doe v. Lyde*, 1 T. R. 597. Mr. Justice Buller's observations, *Doe v. Goff*, 11 East. 668. *Doe v. Jesson*, 5 M. & S. 95. It is singular that the present case should not have been cited either by Mr. Fearn, or by the very learned persons who argued the two last of those cases. There is also a case respecting a limitation of personal property (*Wilson v. Vansittart*, Amb. 562.) where a similar construction was adopted by the Court. *King v. Burckell*, Amb. 378. (and from Lord Northington's MSS 1 Eden, 424.) where the limitation was

to A. for life, remainder to the issue male of A. and to his and their heirs, *share and share* alike, was a determination to a contrary effect; but his Lordship's opinion was grounded upon the general construction of the will, and particular expressions, denoting the intent of the testator, that this was an estate tail in A. and not an estate for life.

(b) The above cited case of *Doe v. Jesson*, strongly resembled the present, as there was a power of appointment given to the first devisee to the heirs of his body, and in default of appointment, a devise to them *share and share* alike, as tenants in common. As to the cases where a bequest has been considered, not as a power in the nature of a trust, but as a power with a bequest over to the object of it, in default of appointment by implication, vide Sugden on Powers, 390.

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It is sufficient that the division must take place at the death of *Richard*, which is within the rules. Therefore two events were provided for: 1st. There being children of *Richard*: in which case they would take; 2dly. There being no children: in which case the estates vested in the persons described. 2d. Then as to what estates passed (a).—The word *present* may be taken in opposition to the estates *to be purchased*: or it may mean all he could devise; but here it receives a different construction from the other contents of the will. The word is not of force sufficient to control the former gifts, and receives a construction from the residuary clause, which it could not be meant to defeat. It cannot extend further than the enumerated estates.

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By the decretal order it is declared, that, according to the true sense and meaning of the will, the estates to be sold under the devise are the freehold estates there enumerated, and all the leasehold estates; and that the other freehold estates, not enumerated in the will, passed thereby to *Rebecca Russel*; and it is ordered, that the estates devised to be sold, should be sold accordingly, and the money to be paid into the *Bank*. And it is declared, that the money so to be paid, will be divisible according to testator's will, in equal shares, among his brother *Thomas Russel's* children, his sister *Willet's* children, and his sister *Parker's* children, living at the time of the death of the testator: and the Master was to enquire what children they had living at the death of testator, and which of them are dead, and whether they left any, and what personal representatives.

(a) The remainder of this judgment is given at very great length, in Mr. *Vesey's* report of the case, to which the reader is referred for that, as well as for the very full account of the arguments of the counsel.

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## TRINITY TERM.

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S. C.

1 Ves. jun. 161.

Order for a receiver to distrain.

## HUGHES v. HUGHES.

**M**R. *Solicitor-General* moved, that the receiver appointed by the Court might be at liberty to distrain. He cited *Pitt v. Snowden*, 3 Atk. 750.

Order granted: the distress to be in the name of the persons having the legal estate (a).

(a) " If a receiver is appointed, and the owner is in possession, application should be made to the Court, that the owner should deliver possession to the receiver, who cannot distrain on the owner in possession, as he is not tenant

nant to him," per Lord *Hardwicke*, 2 Ves. 401. But this seems unintelligible, and as expressed is insensible, but if it can be made sense it must be by understanding the word *owner* for the *lessor or landlord* in one part of the sentence, and for the tenant or lessee in the other. And by that part of the sentence where it is said, that the owner should deliver possession to the receiver, that is, *the landlord* should convey to the receiver: but even then it should be done before the rent became due, for otherwise the receiver could not distrain on the lessee or tenant, called the owner in possession. Taking the whole in this sense the reason given why the receiver cannot

distrain is intelligible, viz. because the tenant is not tenant to him: but this is mere conjecture; for, in truth, the report appears to me to be so grossly mistaken, that no regard ought to be had to it.—(*Serj. Hill.*)

N. B. It appears by the report of this case in 1 Ves. jun. 161, *Lord Chancellor* took it for granted, that by the common order for appointing a receiver, the tenants are to attorn to him, and if the receiver has an attornment, he must distrain in his own name, not of the person having the legal estate. (*Serj. Hill.*) That a receiver cannot proceed in ejectment, vide *Wynn v. Lord Newborough*, post, 88.

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## PEARSON v. BELSHER.

**M**R. *Graham* moved, on the part of the plaintiff, in a pauper cause, to dismiss the bill against two defendants, without costs. Pauper shall not dismiss without costs.

But *Lord Chancellor* ordered it to be upon payment of costs (a).

(a) See this case cited in a note to *Corbett v. Corbett*, 16 Ves. 108. also, upon the subject of paupers, *Frost v. Preston*, ib. 160. *Ratting v. George*, ib. 232. *Wallop v. Warburton*, 2 Cox, 409. *Spencer v. Bryant*, 11 Ves. 49.

## WRIGHT v. BRAINE.

**M**R. *Pemberton* moved for an injunction to stay execution, and that it should also stay trial. S. C.  
2 Cox, 232.  
Injunction to stay execution and trial, not granted on one motion.

*Lord Chancellor* said, they could not be granted as one motion, and therefore granted the first part alone (b).

(b) Upon the authority of the present case, it was established in *Garlick v. Pearson*, 10 Ves. 450. that a motion cannot be made on the same day for the common injunction to stay examination, and the special injunction to stay trial. So, if an injunction has been obtained upon a *dedimus* being granted, it appears that the Court

will not stay trial at the same Seal. For the present practice upon the subject of the affidavits necessary to induce the Court to extend the injunction to stay trial, till after the answer has come in, vide the Editor's note to *Revet v. Braham*, ante, vol. ii. 640.

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1 Ves. jun. 164.

A receiver cannot proceed in ejectment.

## WYNN v. LORD NEWBOROUGH.

**M**R. *Mansfield* moved, on the part of one of the defendants, tenant in tail in remainder (there being no tenant in tail in being) and several tenants of the estate in question, against the receiver, who had been regularly appointed by the Court, to prevent his proceeding in ejectment against the said tenants. Mr. *Richards*, on the part of Lord *Newborough*, the tenant for life; suggested that his Lordship approved of the conduct of the receiver.

*Lord Chancellor* held, that the receiver's authority did not extend so far, as to justify him in taking such a measure; but as the application of the tenants was ill founded, they having no interest, in his opinion, to support the motion, he rejected it with costs (a).

(a) Mr. *Vesey's* report of this case is much more full and satisfactory: upon the principal point in the case his Lordship observed, that "the rents are not to be raised on slight grounds; nor can the receiver turn out the

tenants without application to the Master." That an ejectment cannot be brought against a receiver, vide *Anon.* 6 Ves. 287. *Angel v. Smith*, 9 Ves. 335.

*Ex parte KENT.*

Maintenance allowed for an infant though no cause in Court.

**U**PON a petition for maintenance for an infant, there being no cause in Court, it was doubted by the Register whether it could be done, and *Lord Chancellor* took time to consider of it. And, this day, Mr. *Abbot* cited *Ex parte Whitfield*, 2 Atk. 315. where the same was done upon searching precedents, and *Lord Chancellor* made the order (b).

(b) A great number of cases upon the subject are collected in *Ex parte Sulter*, post, 500.

S. C.

1 Ves. jun. 171.

Widow having different interests under her marriage settlement and her husband's will, and proving the latter, acting under it, and receiving the rents six years, held to have made an election.

## (c) BUTRICK, Widow, v. BRODHURST.

**T**HE plaintiff, previous to her intermarriage with her late husband, being seised of copyhold estate, and possessed of other property, and the husband being possessed of £3,225 3 per cent. consol. by indenture June 16, 1783, he covenanted with trustees (in consideration of the marriage and of the plaintiff's fortune) to transfer £2,000, part thereof, in trust for himself, till the marriage, and afterwards to permit him to receive the interest for life, and

(c) Reg. Lib. A. 1789, fol. 614.

after

after his decease to permit the plaintiff to receive *the interest for her life, in lieu of dower*, and after the decease of both, to pay and apply the £2,000 among the children at 21, or if there should be but one child, then the whole to that one; and, *in default of issue, to apply the whole sum to such persons, and for such uses, as the plaintiff by her will should direct*, and in default of appointment to her representatives; and the plaintiff covenanted to surrender her copyhold estate to the use of herself till the marriage, and afterwards to the use of her husband for life, with remainder to such uses as he by will should appoint, and for want of such appointment to his right heirs.

The plaintiff made a surrender to the uses of the settlement, and the marriage took effect, but the husband never made the transfer.

On the 31st of August, 1784, the husband died, having first made his will, dated April the 10th, in the same year, whereby he devised to trustees, of whom one of the defendants is the survivor, all his estates, real and personal, in trust, to pay certain annuities, and then to pay the residue of the rents and profits of his real estate, and the interest and produce of his personal estate to the plaintiff for life, provided she did not marry again; but in case she should marry again, or at her decease, then he gave the copyhold estate, surrendered by him, to one of the defendants, and the stocks to his sister, a defendant, for life, remainder to her son for life, with remainder over to another of the defendants, and appointed the plaintiff, his wife, executrix of the will.

The plaintiff proved the will, and had been ever since in the receipt of the rents, profits, and produce of the testator's real and personal estate, to the annual amount of £229, and out of it paid the annuities, but now filed her bill against the defendants to have the £2,000, 3 per cent. consol. annuities transferred, upon the trusts of the settlement.

The defendants, by their answers, contended, that by having proved and acted under the will, and received the benefit thereof, she had made her election, and had waived her interest in the £2,000 consol. annuities.

Mr. Solicitor-General, for the plaintiff, contended that the trustees having never acted, her receiving the rents was only an act of necessity, as there was no other person to receive them, and therefore could not bind her as an election. That in the case of the Duke of Montagu (*Lord Beaulieu v. Lord Cardigan*, Amb. 533. 6 Bro. P. C. 232.) (a) there were much stronger acts to shew an election, yet they were held insufficient.

(a) Ed. Toml. vol. iii. 277.

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*Lord Chancellor* said,—All that could be gathered from case was, that an election may be kept open for 50 years (a) no line could be drawn from mere length of time, but it is from circumstances, shewing the intent of the party; that he think the receiving of the rents, much less the taking the per official, could not bind (b); but under all the circumstances the present case, the plaintiff filing her bill for a transfer of stocks, without shewing any ground, must be presumed to have made her election.

*Bill dismissed*

(a) The decision of the House of Lords in reversing Lord Northington's decree, has always been disapproved of. In *Wake v. Wake*, 1 Ves. jnn. 335. S. C. post, 235, Lord Eldon, then Solicitor-General, observed, that he had heard Lord Thurlow say, over and over again, that the case should never bias any other where there is the least difference between them. See also the observations upon it, in the case of *Freke v. Lord Barrington*, post, 274.

(b) So in *Simpson v. Vickers*, 341. the devisee being at law, and having entered, on the will, was not thereby considered as having made an election of will.

(c) See upon this subject the *Earl of Northumberland v. Messers of Granby*, 1 Eden, 489, Editor's note.

### BLOUNT v. BURROW.

**A**N executor, who ought to have been a co-plaintiff, was a defendant, and *Lord Chancellor*, for some time, doubted whether he was entitled to his costs; but at length ordered to be paid to him (d).

(d) See this cause reported upon the principal question which arose in vol. iv. 72.

Rolls.  
 May 19, 21.  
 June 7.

### SCURFIELD v. HOWES.

Legacy to A. for life; remainder to B. and C. or in case one should die, living A. then to the survivor: B. and C. both die in the life of A. the legacy was vested, and went to the survivor. A trustee, joining in a receipt and reconveyance of a mortgaged estate, though he does not receive the money, is liable, and the receipt being in evidence, no enquiry can be directed as to the fact.

**SARAH FOWLER** being entitled to £500 secured mortgage of lands in *Rickmansworth*, by will dated 9th 1762, directed her executors to permit her late husband *Susanna*, the wife of *Michael Homer*, and her assigns, to have the interest arising from the said mortgage, for her separate use during her life; and, if the said mortgage should be paid off, directed the money to be laid out in government securities for the same use, and, after the decease of *Susanna Homer*, she gave the principal sum to the son and daughter of *Susanna Homer* former husband *Mr. Wright*, equally between them, should they share alike, but if either of them should die before the decease of the other, the share of the deceased was to be paid to the survivor.

though he does not receive the money, is liable, and the receipt being in evidence, no enquiry can be directed as to the fact.

their mother, the whole to the survivor, and appointed *Joseph Barnardiston* and the defendant *Samuel Howes* executors.

The testatrix died 1766, and both the executors proved the will.

The only children of *Susanna*, by her former husband *James Wright*, were *John Wright* and *Lydia Wright*. *Lydia* intermarried with *John White* in 1767, and died in September, 1776, in the life-time of her mother and brother, by which *John Wright* became entitled to the £500, subject to the mother's life interest, and afterwards, in consideration of £180, assigned the same to the plaintiff *Scurfield*. *John Wright* afterwards went abroad, and died intestate, and the plaintiff has obtained administration to him.

The bill stated that in 1777, *Barnardiston* and *Howes* received the sum of £500 secured by the mortgage, and laid it out on other securities; but this was contradicted by the answers, *Howes* saying by his answer, that he alone received the £500, and that *Barnardiston* did not receive any part of it; although it was in evidence that he joined in the re-conveyance, and in a receipt for the money, and that no part of it was relaid out on other securities.

Afterwards, in 1779, *Barnardiston* died, and in 1784 *Susanna Homer* also died, by which the plaintiff became entitled to the £500.

*Barnardiston* made a will previous to his decease, and made some of the defendants executors, who renounced, and administration was granted to defendant *Mary Howes*, who was principally interested in the will. In 1780 a bill was filed, and by a decree, on the 6th of June in that year, an account was ordered to be taken of *Barnardiston's* personal estate, and his debts, &c. On the 12th February, 1781, the Master made his report; but the plaintiff never came in before him to prove any debt against the estate of *Barnardiston*, and *Samuel Howes* afterwards became insolvent, and assigned all his estate to trustees, for the purpose of a distribution among his creditors.

The cause came on to be heard at the Rolls, Wednesday, 19th May, when two questions were made,

1st. As to the legacy to the son and daughter of *Susanna Homer* by her first husband, whether, as they both died in the life-time of the mother, the legacy vested in them.

The second question was, how far the estate of *Barnardiston* was liable from his having joined in the receipt and re-conveyance of the mortgaged estate, to the mortgagor.

On this point, the cases of *Sadler v. Hobbs*, (ante, vol. ii. p. 114.) and *Westley v. Clarke*, (1 Cox's P. W. 83. n.) (a) were cited.

(a) This case has been since reported from Lord Northington's MSS. 1 Eden, 357.

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It was pressed on the part of the defendants, that a further enquiry should be gone into as to the fact of *Howes's* receiving the whole money, and *Barnardiston* not receiving any part of it.

But Mr. *Milford* insisting that this would be directing a further enquiry into a fact fully in the knowledge of the parties, and which they might have proved, and comparing it to the case of a bill of revivor, which is never permitted where the facts were in the knowledge of the parties, and could have been brought originally before the Court:

His Honor doubted whether he could direct such enquiry: and said, if the fact was so, though the trustees were obliged as joint tenants to join in the re-conveyance, they need not have joined in the receipt, but the re-conveyance might have been in consideration of payment of the money to the one who really received it, and therefore he inclined to think, the receipt being in evidence, and no proof against it, the plaintiff must have a decree against the estate of *Barnardiston*, but, as it was a hard case, he would consider whether he could make the enquiry.

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On the 28th June, his Honor gave judgment to the following effect:

The plaintiff claims a legacy of £500 secured upon mortgage as assignee, and also as administrator, of *John Wright*. In the last character of administrator, it is, that I think he is entitled: I will therefore be liable to the debts of *John Wright*.

The first question is, whether *John Wright* was himself entitled that is, whether, under the words of the will, the interest upon the death of the sister vested in him. It is contended, on one side that as they both died in the life-time of *Susanna Homer*, either the legacy should be equally divided between their representatives or neither of them should claim. On the other side, several cases are cited to shew that the legacy vested; *Hutchins v. Foy*, Com. 716. *Killet v. Dawson*, (ante, vol. i. p. 119.) *Bemyon v. Madison*, (ante, vol. ii. p. 75.) But it is settled now, that such a legacy is vested; I am, therefore, of opinion that, on the death of *Lydia*, it survived to her brother, and the plaintiff, as administrator, is entitled to this legacy (a). The bill is brought by the plaintiff, as administrator to the brother, for this legacy. The testatrix died in 1766. In 1777, the mortgage was paid off, and an assignment made to the mortgagor by *Barnardiston* and *Howes*, and each acknowledged the receipt of the money. In 1779, *Barnardiston* died. In 1780 Mrs. *Barnardiston* filed her bill, and the usual decree was made for his creditors to come in. It is to be observed, that, when this decree was made, Mrs. *Homer* was alive. She

(a) See the cases upon this point collected in a note by the Editor, to the case of *Killet v. Dawson*, cit. sup.



did not die till 1784 ; so that the reversionary interest had not fallen, and therefore no laches can be attributed to the brother or the plaintiff. It is true they might have had it secured by filing a bill, but parties are not bound to file a bill for security. In 1784 Mrs. *Homer* died, and in 1786 the bill was filed against *Howes* and the representatives of *Barnardiston*. It is objected, that, in point of fact, the money was paid only to *Howes*: on the other hand, it is said that fact does not sufficiently appear in the cause. The admission by *Howes* cannot be received, and there is no evidence before me to rebut the presumption arising from their joining in the receipt. It is desired that I will permit it to go to the Master to enquire as to the truth of that fact; but, though I would not encourage persons who do not make out their case, by going to a further enquiry, I would, in a case which I think a hard one, by some means, make a further enquiry, if I thought it would be of any use. But I think it is unimportant; for it comes to this, that a legacy of a mortgage being given to trustees, for one for life, and then over to another, the mortgage money is paid to one executor, the other joining in the conveyance, signing the receipt, and afterwards neglecting to have it laid out according to the directions in the will; and the question is, whether this will not make the executor liable. It was contended that it was the rule, that executors joining in a receipt, are both liable. To that I enter my dissent, for I do not hold that an executor cannot, in any case, be discharged from a receipt given for conformity (a). I do not find fault with the case of *Westley v. Clarke*: but this case proceeds on a different ground. The cases on the subject are all collected in that of *Sadler v. Hobbs*; and that case must govern, it being a weaker case than this. I have looked into the case of *Townley v. Sherborne*, in *Bridgman*, 35. But I cannot agree with that case. *Fellows v. Mitchel*, 1 P. W. 81, maintained the same doctrine, and till *Westley v. Clarke*, there is no case where an executor joining in a receipt has not been held liable.

In *Murrell v. Pitt*, 2 Vern. 570. 21 Vin. Abr. 534. the plaintiffs were residuary legatees, and brought their bill against execu-

(a) See also observations of Lord *Alvanley*, in *Hoovey v. Blakeman*, 4 Ves. 608. that the joining in a receipt by an executor, should not be considered absolutely conclusive. In the case of *Joy v. Campbell*, 1 Sch. & Lef. 341, the view which is to be taken of these cases is thus ably pointed out by Lord *Redesdale*. The distinction seems to be this, with respect to a mere signing; that if a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving; but if it be given under circumstances, purporting that the money, though not actually received by both executors, was under the con-

troul of both, such a receipt shall charge, and the true question in all those cases seem to have been, whether the money was under the controul of both executors; if it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it, amounted to a direction to pay his co-executor, for it could have no other meaning; he became responsible for the application of the money, just as if he had received it. But this does not apply to what is done in the discharge of a necessary duty of the executor.

tors

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tors who had joined in a transfer of stock, and divided the between them: one had become insolvent, and it was held the other was liable for the whole, because it was a voluntary act. And, in that case, the executors were merely in the case of trustees as the Bank will not admit a transfer but by all the executors. They should be sorry, in such a case, to determine that a man should be bound by the act of his co-executor. There is a case in the 11th page of Viner, (*Attorney-General v. Randall*), which records the case of *Churchill v. Hobson*, and the distinction between trustees and executors, which is also recognised in *Aplyn v. B. Pre. Ch.* 173. and in *Ex parte Belchier and Parsons*, Ambler 178. The cases of *Churchill v. Hobson*, and *Westley v. Clarke*, seem to be the only ones that break in upon the rule: and that of *Westley v. Clarke* only shews that a man who has joined in a receipt is liable in all cases.—But the case of *Sadler v. Hobbs* must undermine the present case; there two executors, unnecessarily without the excuse even of thinking it necessary, joined in signing money to be paid into a house, by which means it was intended that the Lord Chancellor seemed not to approve of the case of *Westley v. Clarke*, and also to think that *Churchill v. Hobson* was wrong. To the opinion given in that case, I subscribe. It does not appear, in that case, what the trust was. Here it was to lay out money in the public funds: it was not money wanted to pay debts, and left in the hands of the trustee for that purpose. Perhaps, in a court of law, the signing the receipt would be conclusive evidence of receiving the money: I think it is not so in a court of equity. But, in this case, *Barnardiston* was the first in making the conveyance and in the receipt; and intermeddled as an active party, I, therefore, think his estate liable (a) (b).

(a) The cases and doctrine upon this subject are collected in the note to *Sadler v. Hobbs*, ante, vol. ii. 114.

(b) In the late case of *Lord Montfort v. Lord Cadogan*, 17 Ves. 489, (afterwards affirmed on appeal, 2 Meriv. 3.) this case was cited by Sir Wm. Grant, as proving, that though the breach of trust was merely a personal default of the trustee, productive of no benefit to his estate, yet his assets were liable

to make compensation, as also the observations of Lord Redesdale, in *Shaw v. Shaw*, 1 Sch. & Lef. 272. that it has been the constant habit of a court of equity to charge persons in the character of trustees, with the consequences of a breach of trust; and to charge their representatives also, whether they derive benefit from the breach of trust or not.

### WITTS v. BODDINGTON.

Jewels, &c. given to the wife for life, and then to such grand-children as she shall appoint. If she makes no appointment, they shall go equally.

**L**EE STEERE, by his will, gave (*inter alia*) to his wife, jewels, plate, &c. for life, and after her decease, to such grand-children in such proportions as she should appoint: if there should be no grand-children alive, then to some of his own relations, but made no provision in default of appointment.

The wife by her will made no appointment, but ordered the plate, &c. to go as her husband had directed by his will.

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And Lord Chancellor was of opinion, and decreed, that they should go among all the grand-children equally (a).

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(a) In the case of *Brown v. Higgs*, 5 Ves. 503, where this case was much relied on in the argument, Lord Alvanley stated it from the Register's book, (A. 1789. fol. 660.) as follows. "*Lee Steere*, by his will gave to his wife the use and enjoyment during her life, of all his watches, jewels, &c. with power for her by will or otherwise, to give and bequeath the same unto and amongst some one or more of the child or children of his said daughter *Martha*, in such manner and proportions as she his said wife shall think proper: but in case no such children of his said daughter should be alive at the time of

his wife's decease, then he desired or directed her to give or leave the same unto some one or more of his own relations, so that the same should not at any time or in any manner go to any of the family of *Witts*." *Elizabeth Steere*, made her will as follows: "The family plate and jewels, I will not bequeath to any grand-child; but as a sincere mark of esteem for my husband's memory, leave them to be disposed of as he has mentioned in his will, if I did not leave them to either of the children." For the cases upon this subject, vide Sugden on Powers, 385. et seq.

## READ v. DEVAYNES.

Rolls, 25th June.

THE testator gave legacies to certain persons by the description of "his very good friends;" and, in the further part of the will, desired them "to act as executors." *Smith*, one of the persons, by his answer, said that he had not proved the will, or acted as executor, but claimed his legacy. His Honour said an executor, so appointed, could not claim his legacy without acting, or at least, proving the will (b).

Executor not entitled to his legacy without proving the will.

(b) There is a report of what passed upon the cause coming on upon further directions, 2 Cox, 285. *Smith*, in his answer, had stated, that he had not proved the will, nor ever meant to prove it. But between the hearing and sitting down the cause for further directions he did prove it. His Honour now thought, that he had sufficiently entitled himself; and that the mere saying he never meant to prove the will, was not a sufficient refusal to act, while there was another executor acting. The general doctrine is clearly settled, that if a legacy is given to a man as executor, whether expressed

to be for care and pains or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor, *Abbot v. Massie*, 3 Ves. 148. *Harrison v. Rowley*, 4 Ves. 216. *Andrew v. Trinity Hall*, 9 Ves. 534. *Stackpoole v. Howell*, 13 Ves. 417. How far an executor could be considered entitled to a legacy in that character, who died without manifesting any intention to accept the trust; or without knowing of it, was stated by Lord Alvanley in the above case of *Harrison v. Rowley*, as a question upon which he gave no opinion.

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## WILLIAMSON v. CURTIS.

Rolls, 25th June.

Where the first trust is for payment of debts, the purchaser is not bound to look to the application of purchase-money.

**B**ILL, *inter al.* for a specific performance against the purchaser of marsh lands, who objected that he should be obliged to look to the application of the purchase-money.

His Honour said, that, where (as in this case) the first trust is for the payment of debts, the trustee may sell, and the purchaser is discharged from looking to the application of the purchase-money (a).

(a) The whole doctrine upon this subject is collected by Mr. Sugden in a very masterly manner, *Vend. & Purch.* 436, et seq. Vide also *Smith v. Guyon*, ante, vol. i. 186.

Rolls, 3d March,  
28th June.

Legacy given to A. to be divided between himself and his family, is well paid to A.

## COOPER v. THORNTON.

**B**ONNEL THORNTON, by will, gave several pecuniary legacies, and among the rest, "to Thomas Cooper, of street, Westminster, one hundred pounds, to be equally divided between himself and his family," and made Winstanley, and the defendant (his wife) executors, and the defendant, residuary legatee, and died May 9, 1768. In November 1769, Winstanley paid the legacy to Thomas Cooper, who at that time had a wife and seven children, six of whom were adults, and the seventh an infant. The father lived till 1775: when he died, no demand having been made by any of his children, of this legacy. Henrietta, the youngest child, became of age in 1777. In 1784, she, and the other children, made a demand of this legacy; and in 1789, they filed this bill (after the death of Winstanley) against the defendant, as executrix and residuary legatee of the testator for this legacy, insisting that the payment to Thomas Cooper was not a good payment: and therefore that the defendant was liable to pay it over again.

The cause was heard at the Rolls on the 3d of March last, and several cases were cited on each side, but as they and the arguments made use of on both sides are comprised in his Honour's judgment, it is unnecessary to repeat them.

On the 28th of June his Honour gave judgment,

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After stating the case, and the demand made by the bill, he proceeded to the following effect:

To this demand, it is contended in answer, upon the common rule of presumption with respect to bonds, that it must be presumed, from the length of time, that the legacy has been paid; but I shall

shall take no notice of this presumption, because it being in proof that it was paid to the father, the case does not admit a presumption that it has been again satisfied. All the cases where that presumption has been admitted have contained circumstances from which the presumption might arise; which not being the case here, there can be no such presumption. The only question then is, whether the payment to the father, is a sufficient bar to the demand made by the plaintiffs. It is argued, on the part of the plaintiffs, that the payment to the father of legacies given to his children who are not of age, is a bad payment. In early times, it appears from the case of *Holloway v. Collins*, in the 26th and 27th Car. 2. 1 Eq. Abr. 300. that the payment to the father of a legacy to the child was held good: but since the case of *Dagley v. Tolferry*, 1 P. W. 285. 1 Eq. Abr. 300: the idea of the Court has been that it is not a good payment; and that even in the case of an adult child it is not good, unless done by the consent of the child, or made so by a subsequent ratification. In that case the rule was laid down, and was laid down very harshly, as the testator on his death-bed had given directions that the legacy should be paid to the father, and there had been mutual accounts between the father and the child, and an acquiescence for near fifteen years. It appears from the Register's book, that evidence was read that the legacy was ordered by the testator to be paid to the father, but that circumstance can make no difference, as I doubt much whether such evidence ought to be read. It would be a dangerous thing to admit evidence that a legacy given to one person was ordered to be paid to another. From the Register's book of the year 1714, folio 414, it appears that the defendant was decreed to pay the plaintiff his legacy with costs, but no interest; and from the book *A.* of the year 1715, folio 40, that an appeal being brought before Lord Cowper, the decree was affirmed; but, as it was thought an hard case, the deposit was divided. I lay the matter out of the case that it was directed to be paid to the father; and although it was so directed, and the money paid, and although the son acquiesced a great length of time, it should be still competent to him or his representatives to demand it; because a contrary determination would encourage such payments, and because the son must acquiesce, or pursue his father; or, which is the same thing, by bringing his suit against the executor, occasion his pursuing the father: and that I take to be the ground on which Sir John Trevor and Lord Cowper went: and if the legatee did not stand in that relation to the person to whom the legacy was paid, the bill would be dismissed. The only other case is *Phillips v. Paget*, 2 Atk. 80. It went off upon a compromise; so that we have no account of it but from Mr. Atkyns's book. There the executor was misled by the testator's directions to pay the legacies within a given time: which circumstance ought to have weight in the judgment. Then let us consider the circumstances of the present

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sent case, for I do not mean to interfere with the doctrine of *Dagley v. Tolferry*, that a payment to the father is bad. The present is a stronger case for the executors than that of *Phillips v. Paget*. Here, after several other legacies, all with the words I give to, &c. is the following, “to *Thomas Cooper to be divided between himself and his family*.” It is contended, that, notwithstanding the case of *Dagley v. Tolferry*, here *Thomas Cooper’s* was to be the hand to receive. I should do the harshest thing imaginable to make the executor pay it over again. It is true the testator has not inserted the words *by him to be divided*. If he had, there could not have been a doubt: but if he meant the executors to divide, why did he mention *Thomas Cooper*? What did he mean by the word *himself*? That can only be applicable if *Thomas Cooper* is to divide. Then it is not to him and his *children* but to his *family*, which is much more extensive. It is to be paid to him, and he, as a trustee, is to divide it. If any of the children had called upon him to have it secured, it must have been so. Therefore, if in *Phillips v. Paget* the executor was discharged *a multo magis*, he must be so here. Then it was paid by *Winstanley* in a manner that was wrong; for I must allow it to be wrong if it was not meant to be paid to *Thomas Cooper*. *Cooper* died in 1775; from that time the plaintiffs might have called upon the executor without his being able to pursue the father. In 1777 the youngest came of age; why did they not then file their bill against *Winstanley*, who did not die till after this bill was filed? For six years they took no step. If they had brought their bill they might have recovered against *Winstanley*. But under the circumstances of the case, I believe it was well paid, and that it was intended that he should receive it. If one was to give a legacy to the Senior Six Clerk, to be divided among himself and the other Six Clerks, I think it should be paid to the senior, and the executor not be put to enquire who the other Six Clerks were. And that if it had been the case of a bequest of goods to *A.* to be divided between himself and family, *A.* with the assent of the executor, might bring trover for the goods.

*Bill dismissed (a).*

(a) See this decree affirmed by the *Lord Chancellor* upon appeal, post, 186.

S. C.

1 Ves. jun. 201.

Lincoln’s-Inn  
Hall, 2d July.

Money to be laid  
out in land, will  
pass by the words  
*lands, tenements,*  
*and hereditaments*  
*whatsoever and*  
*wheresoever*. Di-

vidends of money in the funds not apportioned.

(s) RASHLEIGH v. MASTER.

BY articles previous to the marriage of the Earl of *Coventry* with *Ann Master*, daughter of *Sir Streynsham Master*, bearing date 23d *January*, 1715, it was agreed that £5,000, part of

(s) So vol. iv. 334.

the



the fortune of the intended wife, should be laid out in land, to be settled upon the Earl for life, remainder to the intended wife for life, remainder to the younger children of the marriage, remainder to the Earl in fee. The marriage took effect, but there was no issue; and the Earl died 27th *October*, 1719, having made his will, but not having made any disposition of the £5,000, or of his remainder in fee of the estate, to be purchased therewith, leaving his widow surviving.

The £5,000 was not laid out, but continued on mortgage of the *Coventry* estate, till the year 1731, after which it was laid out on mortgage, on the estate of *Rowland Berkley*, Esq.

*Sir Coventry Carew*, who was entitled, as heir at law to his mother, *Lady Ann Coventry*, daughter of the said Earl by his former wife, to the said £5,000, or the lands to be purchased therewith, subject to the life estate of the *Lady Coventry* therein, made his will, dated 20th *February*, 1747, and thereby gave certain estates called *Rosarrow*, &c. and all other his messuages, lands, tenements, and hereditaments whatsoever, and wheresoever situate, and not therein by him given or devised, together with all Courts, &c. to hold the said estate called *Rosarrow*, &c. which were in jointure to his wife, immediately after her decease, to *Jonathan Rashleigh*, the father of the plaintiff, in fee, and all his other estates, immediately after his decease, to the said *Jonathan Rashleigh* in fee, charging his said estates with the payment of £250 yearly, which he was obliged to pay to *Ann*, Countess dowager of *Coventry*. And he gave all his lands, which he had in mortgage, to his wife, *Lady Mary Carew*, *John Poole*, and *John Sandford*, whom he appointed executors of his will, and died, leaving the late *Sir Warwick Bamfield* his heir at law. The £5,000 was paid off to *Ann*, late Countess of *Coventry*, and in the year 1754, was by her laid out, together with £18 of her own money, in the purchase of £4,800, 3 per cent. *Bank* annuities, in her own name, which were afterwards transferred into her name, and that of *Randle Wilbraham*, Esq. deceased, in which they now stand. The prayer of the bill was, that these annuities (except so much as was purchased by the proper money of *Lady Coventry*) might be transferred and divided, and the dividends thereof, from her death, paid to the plaintiff.

The question was, whether the £5,000 to be laid out in land, passed by the residuary clause as land, or passed to the legatees of the personalty.

*Mr. Mitford*, for the plaintiff, contended,—That it passed as land, by the residuary clause, which, by the terms *lands, tenements, or hereditaments whatsoever and wheresoever*, was sufficiently extensive to pass this interest. That being ordered to be laid out in land, it was land, in this Court. In *Guidot v. Guidot*, 3 Atk. 254. money to be laid out in land, was considered as land, for in this Court

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Court what is to be done is considered as done. Lord *Hardwicke* there cited *Lingen v. Sowray*, 1 P. W. 172. as a case in point.

Mr. *Mansfield* and Mr. *Stanley* contended, for the heir,—That although this was not to be considered as land, not being disposed of expressly, it could not pass by the clause. That there was no case where such an interest had passed by the words, *lands, tenements, and hereditaments*; for although it was an hereditament, it was not of such a nature as generally passes by that word.

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Lord *Chancellor* said,—He thought there was no difficulty, but that this must be considered as land; that the heir argues it so, but still contends it is not devised: but this position is too far from being probable, to afford any argument. The testator sets off with an intention to dispose of all his estates. If he had had estates in different places from those described, it might have afforded an argument that it was descriptive of locality; but here he has added the words *lands, tenements, and hereditaments* whatsoever, and wheresoever. Then the heir argues, that this is a *hereditament*; but, if so, it comes within the description; and it is so, for being to be laid out in land, this Court would enforce the execution of the use (a).

A question arose, as to apportioning the dividends of the money in the funds. To this, the Lord *Chancellor* said, the Court would not apportion dividends: parties consenting to lay out money in stock, must abide the consequences (b) (c).

(a) For the cases in which money directed to be laid out in land, or land to be converted into money, have been considered in equity as converted from the moment of the direction, vide *Pulteney v. Earl of Darlington*, ante, vol. i. 223, and the Editor's note at the end of the case.

(b) In general, equity will not apportion dividends, 1 Fonb. on Equity, 386; but, in a late case, where an annuity charged on real estate in aid of the personal, was ordered to be paid out of a fund in court half-yearly, at Midsummer and Christmas, and the annuitant died between Lady-day and Midsummer; her representative obtained an order for payment of the quarter to Lady-day, *Webb v. Lord*

*Shaftesbury*, 11 Ves. 361. As to the apportionment of rent upon the death of tenant in tail, vide *Vernon v. Vernon*, ante, vol. ii. 659.

(c) Costs were asked for the trustees and executors on the ground of their having been brought into court: this was resisted, because, by their answer, they had claimed this as personalty: his Lordship, however, said, that as it was merely a submission of the point to the opinion of the Court, they ought to have their costs. No costs were given either for or against the heir at law, (Ves.) As to the practice with respect to costs in the case of an heir at law, vide *Seal v. Brownton*, post, 214.

## VAUGHAN v. BURSLEM.

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Hall, 2d and 3d  
July.Chattels directed  
to go as heir-  
looms with an  
estate, "as far as  
the rules of law  
and equity will  
permit," vest in  
the first tenant in  
tail who comes  
into esse.

**T**HOMAS VERNON, of *Hanbury-Hall*, com. *Worcester*, Esq. being seised of divers manors, &c. in the county of *Worcester*, and possessed of a considerable personal estate, consisting, among other things, of ornamental and other plate, pictures, and household goods, in his house at *Hanbury-Hall*, by will, dated 23d September, 1771, gave his manors, &c. to trustees, to uses, under which his wife, *Emma Vernon*, was to receive £1,600 a year during her life, and to pay other annuities, remainder to the use of the first son of the testator's body to be begotten, in tail; remainder to the second and other sons of his body (which uses never took effect;) remainder to the use of his daughter, *Emma Vernon*, for life, *sans waste*; remainder to the use of trustees, to preserve contingent remainders; remainder to the first son of the body of his said daughter, in tail; remainder to the second and other sons of his daughter, in tail; remainder to daughters, in the same manner; remainder to his wife, for life; remainder to the plaintiff, by the description of *Elizabeth Jane Letitia Maunde*, for life, with remainders over, under which the other plaintiffs would take estates, subject to the life of *Emma Vernon*, the younger, the estates tail to her children, and the life-estates of *Emma Vernon*, the elder, and *Elizabeth Maunde*, now the plaintiff *Elizabeth Jane Letitia Vaughan*. He then gave the use of his pictures to his wife for life, and directed that she should have the use of his plate until a son of his body begotten should attain 21; or until his daughter *Emma* should attain 21, or be married, which should first happen; and then desired such son, or his daughter *Emma*, should have the use of the plate; and directed further, that all his plate, household goods, furniture, glasses, and china, which should be in his house at *Hanbury-Hall*, should go as heir-looms with his real estate, and be held and enjoyed by the person or persons that shall, for the time being, by virtue of his will, be entitled to his said real estate, as far as the rules of law and equity will permit, and directed an inventory of the plate to go with the estate.

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The testator died soon after making the will, leaving *Emma*, his widow, and *Emma*, the younger, his only child, him surviving; *Emma*, the widow, took possession of the pictures and plate, and kept them till the marriage of *Emma*, the younger, with *Henry Cecil*, Esq. in the year 1776, when *Henry Cecil* and *Emma*, then his wife, took possession of the same, together with the house at *Hanbury-Hall*; and, upon the death of *Emma*, the elder, they also took possession of the pictures, and some plate, which were given to *Emma*, the elder, for life; and afterwards *Henry Cecil* disposed of the plate, by sale or exchange, for more modern or fashionable plate.

Henry

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*Henry Cecil* had, by his wife *Emma*, a son born (who lived six weeks) and who was tenant in tail in remainder under the will of *Thomas Vernon*, his maternal grandfather; and, upon his death, *Henry Cecil* obtained administration to him.

*Henry Cecil* afterwards going abroad, gave a power of attorney to the defendant *Burslem*, whereby he authorised him to act as his attorney, and by virtue whereof *Burslem* removed the plate from *Hunbury-Hall*.

The plaintiffs, as persons entitled in remainder to the estate, and as they contended also to the plate, &c. directed to go with them as heir-looms, filed their bill against *Burslem*, the attorney of *Henry Cecil*, who was out of the jurisdiction of the court, and against *Emma Cecil*, who lived separate from her husband, praying that an inventory might be taken of the plate, and an account of that which had been sold or exchanged, and the effects returned to *Hunbury-Hall*, and secured there for the benefit of the persons interested in the estate, and that *Burslem* might be restrained by injunction from selling the same.

The defendant *Burslem*, by his answer, admitted the facts, but insisted that by virtue of the letters of administration to his son, and in right of *Emma*, his wife, *Henry Cecil* had the absolute interest in the effects devised as heir-looms, and that he, the defendant, as his attorney, was entitled to dispose of the same.

Mr. *Steele*, for the plaintiffs.—The only question is, whether this case is exactly within the rule of *Foley v. Burnell* (ante, vol. i. p. 274); or the words, “as far as the rules of law and equity will permit,” take it out of that rule.

In *Gower v. Grosvenor*, Barn. 54. Lord *Hardwicke* was of opinion, that when the testator uses the words “as far as the rules of law and equity will permit,” a court of equity will carry the limitation as far as the Court could execute it. And it might certainly have been so limited here, as to prevent the son from taking it till he attained 21, and entitled to the possession of the estate; and the limitation might have been, that, in case he died under 21, the plate should go over with the estate: that limitation would have been good, as being within 21 years after a life in being; and, as the son might have been prevented from taking till 21, the Court will say it is left to it to make the limitation. In *Gower v. Grosvenor*, Lord *Hardwicke* drew the consequence from the words, which were the same as in this case, and held there was no aim at a perpetuity.—In *Trafford v. Trafford*, 3 Atk. 347. furniture was given as heir-looms, and the Court held itself bound to effectuate the intention of the testator. In *Foley v. Burnell*, there were no such words, and for that reason it was that the Court thought the property vested.

Mr. *Mansfield*, for the other parties in the same interest.—The only question is, whether the rules of law and equity will permit the

the limitation, and whether the chattels can be carried with the real estate longer than the birth of a person, who would be tenant in tail of the real estate.

The struggle in *Foley v. Burnell*, was to find words equivalent to the present: for it was taken for granted, if the will had contained such words, the Court would have given them effect.

Mr. *Mitford* and Mr. *Cox*, for the defendant *Burslem*.—We contend that Mr. *Cecil*, as husband of *Emma* the daughter, and as administrator of his son, is entitled to the absolute property. The question is whether the plaintiffs, after the birth of the son, can have any interest. *Foley v. Burnell* differs in some respects from the present case.—The gift was to the person who should be entitled to the possession of the real estate. It was argued that, not being in possession, he was not entitled to the goods, but it was held that he took an absolute interest. *Trafford v. Trafford* is not applicable to the present case. Nothing was to be taken in that case by any person till 21; that was a condition on which he was to take, and being tenant in tail alone would not do. In *Gower v. Grosvenor* it is said the words gave the Court a power to model the limitation. But no such thing was determined. All that was determined was, that the person only took a life interest, and that, as there were words of reference, it was the same as if the words had been repeated, and, in the event of not having issue, the chattels went over. It was merely that Sir *Thomas* did not take absolutely.—Here the disposition is, that the goods shall go as heir-looms. Some interest was meant to pass to Mr. *Cecil's* son. Then the only question is, whether your Lordship can modify the limitation with all the strictness a conveyancer could invent. The children of the marriage were meant to be entitled to the estate. Suppose the child had married under 21, and died, having a child, what could your Lordship do?—The words, *as far as law and equity will permit*, are only that the goods shall be enjoyed by the persons who in law or equity are *entitled* to the estate, and are satisfied by letting a person who is entitled to the real estate as tenant in tail, have the chattels absolutely; and he must, by the rules of the Court, have the chattels absolutely, if he is entitled to the realty as tenant in tail.—If the restriction contended for were to prevail, the consequence might be, that the tenant for life and the tenant in tail in remainder might suffer a recovery of the real estate, and dispose of that, but could not dispose of the chattels meant to accompany it; for the real estate would be alienable, by the tenant in tail joining after 21, though not in possession, and yet he could not convey the personal chattels. It may be true that, had the testator been asked if an infant should become so entitled, whether it was his will he should take the chattels absolutely; he would have answered no; but that cannot be admitted: if the testator gives a legal title, it must have its legal consequences.

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consequences. This is the rule which has been adopted in matters analogous to the present.

Mr. *Solicitor-General* in reply.—The only question is, whether there may not be super-added to an estate tail, a limitation that is not too remote in point of time, that if the party to whom the estate tail is given should die under 21, the estate shall go over, and whether this limitation would not be good. Such a limitation of the personal estate expressly made would certainly have been good. Then the question is, whether the testator can be supposed to have meant more in this case than if he had said “to be heir-looms for ever.” It was not attempted to be argued in *Foley v. Burnell*, that if the words had been the same with those in *Gower v. Grosvenor*, they must not have had the same effect as they had in that case. This being a gift to the person taking the real estate, the testator meant that person should take the same interest in the chattels as in the real estate, qualified, as to alienation, as far as he could have limited it, and subject to its going with the realty as long as by law it might, which would be that a child not attaining 21 could not dispose of it. In *Gower v. Grosvenor*, Lord *Hardwicke* thought it should go to a Master to form a settlement. In *Trafford v. Trafford*, he conceived he executed the idea he threw out in *Gower v. Grosvenor*: he thought it should go to the first tenant in tail who should attain 21. In the *Duke of Bridgewater v. Littleton*, (ante, vol. i. p. 280. note, less correctly stated 2 Ves. 121.) there is nothing with respect to the chattels going as long as law or equity will permit.—In the present case there is no direct gift to the devisees of the real estate, only a direction how the chattels shall go.

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Lord Chancellor. I am called upon to say that the effect of the will is to prevent the use from springing, where if it sprang it would give an absolute estate. To do this, I must determine that the use shall not spring or vest till 22 years after the death of *Emma*, the first taker for life. How am I to gather this? from the words “as far as the rules of law and equity will permit?” This cannot be; the uses could not go further than the law will permit. But these words have their sense; for he seems to have known that the personal property could not go so far as the real. The case of *Gower v. Grosvenor* has the same words: and it seems as if the reporter took the language of Lord *Hardwicke*; but there is a considerable chasm, and with what modifications that was filled up I cannot say: but I think it is not necessary to follow all that is there said. Here the estates are given to *Emma* for life, remainder to the first and other sons, with remainder over, and the furniture, &c. is to go to the person entitled to the estate, as far as the law will permit.—The person entitled seems an express description of the child of *Cecil*. The other cases have had different

ferent words. In *Foley v. Burnell* it was contended the word *possession* was in opposition to *reversion*; the use there did not spring for want of the contingency arising on which it was to spring. It would be pedantic to say, that *Gower v. Grosvenor* turns on the words "as far as the law allows;" for they are explained by the different natures of real and personal estates. To do what is called for in this case, I must go much further than ever has been done; for I know no instance where the conveyance has been carried to the utmost extent of what the law *might do*. I know conveyancers have endeavoured to frame a case to the utmost extent it can be carried: but here it might be suspended to 22 years after a life in being. He certainly meant the son, if he was in possession, should have them. What then, shall they not be in possession in the mean time, not vest in any body? Cases which say you shall do all this for the testator, by saying you shall do all that can be done, will not do. This would be fetching the intent of the testator in a way many cases have said it cannot be done. The property cannot be rendered inalienable but by preventing the use from springing; which cannot be when a person is born who would take absolutely. It would be a direction to keep it unalienable as long as could possibly be. I am of opinion that the words are not sufficient to give such a construction, and that consequently, I must declare that this property vested in the son of *Emma*, and goes to the father as his representative.

*Bill dismissed (a).*

(a) The modern doctrine upon this subject is collected in the Editor's note to *Foley v. Burnell*, ante, vol. i. 274.

### BROWNE v. SOUTHOUSE.

**ELIZABETH WYVIL** died 5th March, 1767, intestate and without issue, possessed of considerable property, leaving *Mary Wyvil*, her sister, and only next of kin, who at that time, and to the time of her death, was insane. *William Wyvil* obtained letters of administration, during the insanity of *Mary Wyvil*, and gave letters of attorney to the defendant *Southouse*, an attorney, to collect and get in the estate of *Elizabeth Wyvil*, and to lay the same out in the funds. He received several sums, and by letter, recommended to *William Wyvil*, that the monies received should be laid out in the 3 per cents. which *Wyvil* acquiesced in by letter, 6th Feb. 1768; and informed the defendant, he should want no more of the money, and never afterwards made any demand upon him the defendant, who from time to time informed *Wyvil* that he had laid out the money received by him, in the funds or otherwise, but which the defendant in fact always kept. *William Wyvil* died about November, 1780, and appointed

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Agent of an administrator keeping money of the intestate's in his hands, which he had proposed to his principal to lay out in the funds, ordered to pay interest.



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the other defendants his executors. *Mary Wyvil* died about 5th April, 1786, intestate and insane, and left plaintiff, her aunt and next of kin, who obtained letters of administration *de bonis non* of *Elizabeth Wyvil*, and also administration of *Mary Wyvil*, and in that capacity filed the present bill, for an account against the defendant *Southouse*, and the executors of *William Wyvil*, praying also interest for the sums which the defendant *Southouse*, kept in his hands, and did not improve at interest.

The defendant, by his answer, set forth an account of the monies received and laid out; by which it appeared that he had, from time to time, large balances in his hands: but, with respect to the payment of interest, he made two defences: 1st. That he had received no orders or instructions to lay out the money. 2dly. That he had blended the money with his own, and conceiving himself liable to account for, or pay the money, he kept sufficient by him, or in his banker's hands, for the purpose.

It was in evidence, that there was a loss, by the monies received not being regularly laid out, of about £800.

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*Lord Chancellor* said, That it was a clearly established point, that the defendant had received money, but that that would not have bound him, if he had not been under a duty to make interest of it, for the benefit of the estate; because then it would only be holding the money as a banker holds it; but here was an employment, accepted by the defendant *Southouse*, to lay out the money from time to time. It is said, he is not liable, because an administrator is not bound to invest the monies in his hands, so as to make interest: but here he has bound himself. Therefore an account must be taken of the times when he received monies belonging to the estate, and when he ought to have laid them out; and he must answer interest at 4 per cent. from the times when he ought to have laid them out. (a).

(a) All the modern cases upon this subject are collected and arranged in

a note to the case of *Newton v. Bernet*, ante, vol. i. 362.



## HARRISON v. NAYLOR (a).

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2 Cox, 247.

Lincoln's-Inn  
Hall, 6th July.

**THOMAS NAYLOR**, by will, bequeathed £5,000 to his natural daughter, now *Elizabeth Harrison*, one of the plaintiffs, and £3,000 to his unborn child, to be paid them when they should respectively attain the age of 21, unless, on account of their misconduct, the trustees of his will should think fit to postpone the payment till they should respectively attain the age of 24; and which legacies, he directed, should be *collected and raised in the manner and by the means thereafter pointed out and explained*. He then directed his executors, after satisfying all debts and legacies, to lodge and vest the remainder of his personal estate in *Bank stock*; and desired them to purchase a certain estate formerly belonging to his family, if the same could be purchased; and if it could not, to purchase some other freehold estate. And he, by his said will, gave and devised such freehold estate, when purchased, to his natural son *Thomas Naylor*, and to the male heirs of his body for ever, and if he should die without issue male, then to the heir male of his natural daughter *Elizabeth*, provided he assume the name of *Naylor*; but if his said natural daughter should have no issue, then to her next heir at law, provided he assume the name of *Naylor*. He then directs the sum of £225 *per annum* to be applied out of the rents and profits of his said estate, for and towards the maintenance of his said children; and directed and required the executors to apply the *residue and the remainder of the rents and profits of the said estate to the purpose of raising and providing the legacies thereby given to his said natural children*: and if the said rents and profits proved insufficient, then he made the estate so to be purchased, chargeable with the payment of the same, or the remainder thereof.

The child, who was unborn at the time of the testator's making his will, died an infant, and administration was obtained by authority of a sign manual. *Elizabeth* intermarried with plaintiff *Harrison*, but there was no issue of the marriage. The bill prayed directions and execution of the trusts.

*Mr. Mansfield*, for the plaintiff.—The money to be laid out in the purchase of a freehold estate, is that which shall remain after payment of debts and legacies.

When the legacy has lapsed by the death of the legatee, on account of its being charged upon a real estate, the estate has been in the possession of the testator at the time of his death. Whereas this, if it be to affect real estates, is a charge on an estate to be purchased: but we contend that it is charged on the personal estate, and that the real is not to be purchased till the legacies are

Testator gives legacies to be raised by the means after pointed out; then directs an estate to be purchased, a sum to be raised for maintenance, and the residue of the rents to be applied to raise the legacies, and in default, makes the estate liable: The legacies are not personal, but a charge on the real estate; and one of the legatees dying an infant, the legacy shall not be raised for the administrator.

Testator directs his executors to invest [ 109 ] personal estate in the purchase of real estates, which, when purchased, he devises to A. to him and the male heirs of his body for ever; and if A. should die without issue male, then he devised the same to the heir male of the body of B. After the estate tail to A. the Court will insert a limitation to trustees to preserve contingent remainders (b).

(a) Reg. Lib. A. 1789, fol. 632.

serted from Mr. Cox's report.

(b) This marginal abstract is in-

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paid. The testator intended his estate to be so limited as to secure an estate to the male heirs of *Thomas Naylor*, and, in failure of them, to the male heirs of *Elizabeth*, for which purpose the plaintiffs submit that the conveyance ought to be to *Naylor* for life, in strict settlement; remainder to the heirs male of *Elizabeth*.

Mr. Solicitor-General, for defendant *Naylor*, submitted that the legacy was to be considered as charged upon land; and the legatees having died before the same was raisable, that the same sinks into the land.

It is admitted the legacy is *in presenti*, though *solvendum in futuro*.

By the words "the legacies to be collected and raised in manner after-mentioned," the testator cannot be considered to have intended the legacy should be paid out of the personal estate before the purchase of the real, he having afterwards charged the real. His intention seems to have been, that his estate should be settled upon his son, charged with the legacies to his other children, and £225 *per annum*, for their maintenance and education.

Where a legacy is given by a stranger, charged upon land, though with interest, if the legatee dies, it will sink into the land; *Gawler v. Standewicke*, (ante, vol. i. p. 106.) but there can be no doubt, where it is given by a father, by way of portion, this Court will not charge the estate with it, if the child dies before he wants it. It is clear that the testator here was anxious to provide an entailed estate in his family.

Lord Chancellor.—I thought at first it was a mere personal legacy; but I doubt, upon the whole, whether it must not be considered as charged on the land; the testator having referred to the manner in which it is to be raised, and having afterwards provided for the payment of it, by charging his real estate. The moment the money ought to be laid out in land, it must be considered as a real fund, and therefore within the common rule.

The conveyance was therefore directed to be to *Thomas Naylor* in tail male, remainder to trustees to support contingent remainders; remainder to the heirs male of *Elizabeth*; and if she should die without heirs male, remainder to the heirs male of the testator in fee (a).

(a) The following account of the other point in this cause is given by Mr. Cox:—"As to the second question, his Lordship said it was impossible to argue against *Thomas Naylor's* having an estate tail in the estates to be purchased; but as there were remainders over, the money must be invested, and the land settled to the use of *Thomas Naylor*, and the heirs of his body, with a contingent remainder to

the person, who should answer the description of heir male of *Elizabeth Naylor*, at the time of her death in tail, with remainder to the right heir of the testator. *Mitford* then suggested, that as this was an executory trust, the Court would interpose after the estate tail in *Thomas Naylor*, a limitation to trustees to preserve the contingent remainders to the heir male of *Elizabeth*, &c. And his Lordship was

was of opinion, that such a limitation should be inserted. His Lordship declared that the uses were to be to *Thomas Naylor* and his heirs in tail male, with remainder to trustees to support contingent remainders; remainder to the heirs male of *Elizabeth Harrison* in fee, and if she should have no heirs male, then to the heir at law of the said testator in fee. Reg. Lib. A. 1789, fol. 632. See the notice taken of this by *Wilson, J.* and

*Buller, J.* in *Habergham v. Vincent*, post, vol. lv. and particularly by Lord *Eldon* in *Stansfeld v. Habergham*, 10 Ves. 280. Mr. *Vesey*, in a note (ib.) observes, that in a subsequent branch of this cause the *Master of the Rolls* noticed the inaccurate language of the decree as it stands in the Registrar's Book in the limitation to *Thos. Naylor* and the testator's natural son and his heirs in tail male.

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## CAREY v. GOODINGE.

**GOODINGE**, the testator, by will dated 10th *June*, 1783, gave to the defendant his brother *Henry Goodinge*, £500, and to his nephew, the defendant *Henry Goodinge, jun.* £500, and appointed them executors, but made no disposition of the residue. He also wrote a letter to the nephew, in which, among other things, he referred him to certain letters in *Chambers's* dictionary as *worth looking for*, and directed him to pay the plaintiff, *Carey*, £200.

*Henry Goodinge*, the brother, was indebted to the testator £7,000, and *Henry Goodinge, jun.* was indebted to him £1,000 at the time of his decease. Upon searching the titles referred to in *Chambers's* dictionary, *Bank* notes were found to a considerable amount.

The bill was by the next of kin, and prayed an account of the personal estate of the testator, and particularly of the sums in which the executors were indebted to him, and payment of the same to the plaintiffs.

Mr. *Solicitor-General*, and Mr. *Mansfield*, for the defendants, contended: first, that the appointment of the brother and nephew executors, is an extinguishment of the debt. This is clearly so at law; and there is no case in this Court, where it has been held otherwise, except where there has been a direct gift of the residue. That was the case in *Brown v. Selwin*, For. 240, and even there, Lord *Talbot* spoke of it as an undecided point: but there is no case where it has not been held an extinguishment against the next of kin.

Second, that having (by this mean,) unequal legacies, and there being no disposition of the residue, the brothers as executors were entitled to it. That by appointing them executors, the testator had shewn his intention of giving them the personal estate: that he had not left it here to the mere appointment, as the letter to the nephew was not unimportant; the reference to the parts of *Chambers's* dictionary where the notes were found, is tantamount to saying,

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Hall, 7th *July*.

Testator gave his brother and nephew legacies, and appointed them executors, but did not dispose of the residue. They were indebted to him in unequal sums; this is no release of the debts, and they are trustees for the next of kin, as to the residue.

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ing, you will pay *Carey* £200 out of the notes, and will take the remainder. It is inconsistent with the idea of their being executors in trust.

*Lord Chancellor* said, he thought it had been a settled point in this Court, that the appointment of the debtor executor, *was no more than parting with the action* (a): and declared it a trust for the next of kin (b).

(a) *Wankford v. Wankford*, 1 Salk. 299, but that a trust is raised in equity is now so perfectly settled that in the late case of *Berry v. Usher*, 11 Ves. 90. the point was given up without argument.

(b) For the cases and doctrine upon the subject of executors being trustees for the next of kin, vide the Editor's note to *Bowker v. Hunter*, ante, vol. i. 334.

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Lincoln's-Inn  
Hall, 7th July.

One trustee suffering the other to have the trust-money, under a note of hand, held liable.

KEBLE v. THOMPSON.

**T**HOMPSON and *Pyefinch* were co-trustees. A sum of £1,036 was paid to *Pyefinch*, on account of the trust fund, he lent it to *Thompson*, and took a note of hand.

*Pyefinch* and *Thompson* were both become bankrupts.

*Lord Chancellor* said, if a trustee will suffer a co-trustee to detain a sum of money belonging to the trust estate, they are both liable: and ordered the debt to be proved against both estates (a).

(a) Though it seems at one time to have been thought not to have been a breach of trust, in executors or trustees lending money upon personal security, *Harden v. Parsons*, 1 Eden, 145. yet the contrary is now distinctly established, *Ryder v. Bickerton*, 1 Eden, 149. n. *Adye v. Feuilletau*, 1 Cox, 24. *Wilkes v. Steward*, Coop. Ch. Rep. 6. As to the cases upon the general doctrine of the liability of trustees and executors, vide *Sadler v. Hobbs*, ante, vol. ii. 114. *Scarfild v. Howes*, ante, 90.

*Roxth v. Howell*, 3 Ves. 565. *Knight v. Lord Plymouth*, cit. ib. *Hovey v. Blakeman*, 4 Ves. 596. *Bacon v. Bacon*, 5 Ves. 331. *Adams v. Claxton*, 6 Ves. 226. *Caffrey v. Darby*, ib. 488. *Chambers v. Minchin*, 7 Ves. 186. *Doyle v. Blake*, 2 Sch. & Lef. 231. *Brice v. Stokes*, 11 Ves. 319. *Langford v. Gascoyne*, ib. 333. *Wren v. Kirton*, ib. 377. *Lord Shipbrook v. Lord Hinchinbrook*, 16 Ves. 477. *Tebbs v. Carpenter*, 1 Mad. Rep. 290. *Underwood v. Stevens*, 1 Meriv. 712.

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1 Ves. jun. 206.

2 Cox, 260.

Lincoln's-Inn  
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The tenant having by misrepresentation and collusion with the plaintiff's steward obtained a re-

newal of the lease for lives as if one only had dropped, and two were to be exchanged, when in fact two lives had fallen, decreed to pay the value of the two lives; and shall not have the option of delivering up the new, and abiding by his former lease.

The Earl of ABINGDON v. BUTLER and Another.

**T**HE plaintiff being seised for life of the manor of *Cumner*, in the county of *Berks*, with a power of leasing for 21 years, or three lives in being, by lease, dated 24th October, 1766, demised certain premises therein described, and being part of the said

manor,

manor, to *John Godfrey*, to hold for the term of 99 years, if the said *John Godfrey*, *Bertie Thomas Egerton*, and *Jane Polly Egerton*, or either of them, should so long live, under the rents therein reserved. This lease, by mesne assignments, came into the possession of the defendant, *Ralph Butler*.

In 1780, *John Godfrey* died, and in 1785 *Bertie Thomas Egerton* died, by which the interest of the defendant, *Ralph Butler*, was reduced to one life only, viz. that of *Jane Polly Egerton*.

The defendant *Butler*, in 1786, being desirous of obtaining a new lease, and of substituting the names of his three sons, *William Butler*, *Ralph Butler*, and *John Butler*, for the lives of the persons deceased, and for that of *Jane Polly Egerton*, applied to the defendant *Penson*, who was then steward to the plaintiff of his manor of *Cumner*, to settle terms for the renewal of the lease. The bill charged, that both the defendants knew, at the time that *Bertie Thomas Egerton* was dead, as well as *John Godfrey*; but this was denied by the answers.

The bill also charged, that the rule which the steward had always followed in renewal of leases, in the said manor, had been to assess one year's purchase for changing a life, and seven years purchase for adding two lives to one, according to the yearly value appearing in a book in the possession of the defendant *Penson*. And that it appeared by the said book, that the estate comprised in the said lease, was valued at £102 per annum, but that the defendants agreed that the fine should be assessed, as if *Bertie Thomas Egerton* was living, which would only be adding a life in the place of *John Godfrey*; and it appearing to be the practice, that the fine, upon adding one life to two, was two years purchase, the defendants agreed that the fine should stand at £200, as if two lives had been in being, and that nothing should be paid for exchanging the lives of *Bertie Thomas Egerton*, and *Jane Polly Egerton*, for those of two of the sons of defendant *Butler*. The matter being thus represented to the plaintiff (though the exchange of two lives, and renewal of the other, were entered in the contract book) and the sum of £200 being accordingly paid, plaintiff executed a lease, bearing date 19th October, 1786, of the premises, to the defendant *Butler*, for the term of 99 years, if *William Butler*, *Ralph Butler*, and *John Butler* (sons of defendant *Butler*, or either of them, should so long live); that the defendant *Butler* called upon the plaintiff in town for the lease, which was delivered to him, but the defendant did not inform the plaintiff that *Bertie Thomas Egerton* was then dead.

The plaintiff afterwards discovering that *Bertie Thomas Egerton* was dead at the time of granting the lease, applied to defendant to pay him the difference of the fine, as upon the substitution of two lives, which the defendant refused.

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The original bill had prayed, that the lease might be delivered up to be cancelled, or the further sum paid.

But the defendant, by his answer, submitting to deliver up the new, and to abide by his old lease, upon repayment of the £200 actually paid (a):

The plaintiff amended his bill, and prayed that it might be declared, that the lease was fraudulently obtained, and that the defendant *Butler* might be decreed to pay to the plaintiff the further sum of £616, or such sum as the Court should think a fit consideration for the renewal; and in default of payment by defendant *Butler*, that defendant *Penson* might be decreed to pay the same.

On the part of the plaintiff, Mr. *Attorney-General* contended, That as the defendant had pressed for the execution of this contract, upon grounds which he knew to be false, he was bound to abide whatever might be the real value of the contract, upon a reference to the Master.

He also contended, that the suit was made necessary, even to the point of rescinding the contract, by the defendant's refusal either to abandon the lease, or to pay the just value of it.

The plaintiff read a deposition, proving this refusal; and he also read the admission of the defendant in his answer, that soon after the execution of the lease he called upon Lord *Abingdon*, and concealed the fact that another life had dropt; alledging, as a reason for that concealment, his fear of losing the £200, unless he had the estate as a security for it.

Lord Chancellor said,—He had some doubts whether the fraud imputed was proved; that is, whether there was fraud in obtaining the lease.

Mr. *Hardinge*, of the same side with the *Attorney-General*, insisted, that the lease was, in a correct sense of the word, obtained by fraud; though, perhaps, that fraud may have originated after

(a) The defendant by his answer admitted, that when he applied to the plaintiff for the lease, he told the plaintiff that he had paid the £200 to defendant *Pearson*, and that such sum of £200 was the consideration for exchanging two lives and adding one; that the plaintiff did not at that time know that two lives had dropped, and that he the defendant did not then disclose to him the fact of the death of the said *Bertie Thomas Egerton*; and that his reason for not doing so, were, that he was apprehensive that if the agreement was set aside, and he should be put to come in a simple-contract

creditor for the £200 so paid by him, he should be put to great difficulties in recovering the same; and the defendant by the said answer further admitted, that before he took away the lease, he knew of the second life having dropped, though, for the reasons aforesaid, he did not acquaint the plaintiff of the fact; but he denied any knowledge of the fact at the time of his contract for the lease; and he submitted to deliver up the new, and to abide by his old lease upon repayment by the plaintiff of the £200. Cox's Report from the Register's Book.

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the *execution* of the instrument : but that, before the delivery of it, the defendant, in the very moment of asking for it, concealed a fact, which, if the lessor had known, he would have countermanded the direction to deliver the instrument : that he obtained it therefore, that is, obtained the *possession* and *advantage* of it, by a palpable cheat.

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The *Lord Chancellor* immediately adopted this reasoning, and then stated his doubts, whether the plaintiff was not entitled, even to an option, according to his amended bill, between rescinding the contract, and upholding it upon payment of the value of the difference.

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Mr. Solicitor-General argued,—That no such thing was ever done, and that re-instatement of the parties in their condition before the contract, was the single equity that could be reached in cases of the most unqualified fraud : that the court never punished fraud in one contract actually made, by forcing upon the author of that fraud another contract, which he never dreamt of making.

Then, as to the re-instatement, he insisted, that it was offered by the defendant in his answer to the original bill ; that the plaintiff instead of accepting the offer, had filed a new and amended bill, widening his equity, insisting upon the option, and claiming to establish the lease upon a new valuation ; though his original bill affected only to rescind the contract, and though he had himself made an offer to the defendant prior to the bill, upon the idea of merely re-instating the parties. He argued, therefore, that the plaintiff should pay his own costs of the amended bill.

Lord Chancellor held, that as the fraud was in the article of price, and the estate acquired by that fraud, the person defrauded had an equity in correcting the value, and compelling the person who had so defrauded him, to pay it. He adverted to a case from *Ireland*, in which he had laid down the same rule, and acted upon it ; but he could not recollect the name of the particular facts.

It was then contended by *Mr. Abbott*, as counsel for *Mr. Penson*, the agent, that the bill ought to be dismissed against him, with costs, no fraud in him as to this contract having been proved.

But the plaintiff's counsel read *Penson's* admission, that he had stated, in a letter to *Lord Abingdon*, the contract, as only having been for adding one life ; when, in truth, according to his own statement, it was for adding one life, and changing two, which made a very material difference in the real value.

Mr.

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Mr. *Abbott* answered, that he had stated the fact in the contract book as it really was, which book Mr. *Estwicke*, the Auditor, might have seen, but would not examine; so that by mistake in the audit account the fact was incorrectly described.

But the *Lord Chancellor* said,—The entry in the audit account must have originated with him, and was a palpable fraud. He should therefore not only make him pay his costs, but also the additional value of the estate, if the other defendant could not pay it.

The decree was,—That an account should be taken of the value of the lease at the time of its execution; that the defendant *Butler* should pay that value, with the costs of the suit; and that in default of his payment, the deficiency should be made good by *Penson*, the other defendant, who should pay his own costs (a).

(a) Reg. Lib. A. 1789. fol. 502. Mr. *Vesey's* report of the judgment is generally much more full, either than the present or than that of Mr. *Cox*: it is also extremely valuable, for containing his Lordship's observations upon the plaintiff's having amended his bill.

WARDELL v. WARDELL.

Lincoln's-Inn
 Hall, 9th July.

Testator, by his will, taking notice that he had not surrendered copyhold estates, which he devised, but directing his son to convey them, and devising to the son other estates, though the copyholds are not devisable by custom, yet the surrenders decreed to be made.

TESTATOR, having limited several copyhold estates upon certain trusts, observes that "Whereas I have omitted to do or put proper surrenders, or other proper acts of and concerning some part or parts of my copyhold and customary lands, hereditaments, and estates, to the use of my will, or otherwise to enable me to dispose of the same by my will, and for want thereof, the same will descend to my son *John* as my heir at law, contrary to my intention and this my will: now I do hereby will, order, and direct, that my said son *John*, or his heirs, when or as soon as he or they shall attain the age of 21 years, shall and do, upon request and charges in the law of the persons interested and requesting the same, pass sufficient surrenders, and do all other acts in law required and necessary for establishing and confirming the several estates herein limited to them respectively, and that in default thereof, or upon refusal or neglect so to do, the estate herein limited or appointed to my said son *John* and the heirs of his body, shall immediately from thenceforth cease and determine, and the several remainders thereupon expectant shall successively take effect in possession, in the same manner, and to all intents and purposes, as if my son *John* was actually dead without issue, and that in the mean time, and until such refusal or neglect, the said copyhold and customary estates shall go, be held and enjoyed according to this my will."

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The

The customary estates not being devisable, it was insisted the Court could not decree a surrender.

Lord Chancellor was clearly of opinion—that though they were not devisable by the custom, yet as the testator might dispose of them, and had marked his intention so to do, that brings it within the principle upon which the Court proceeds in supplying surrenders for payment of debts or provisions for younger children, which are considered as meritorious considerations; and decreed the surrenders prayed by the bill (a).

(a) 1 Eq. Ab. 123. 2 Ves. 271. *Wardle v. Pike* v. *White*, post, 286. v. *Wardle*, Amb. 299. and see particu-

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v.
WARDELL.

CROWE v. BALLARD.

THE late Lord *Litchfield*, by his will made in the year 1774, gave to the plaintiff *Robert Crowe*, a legacy of £1,000 to be paid him at the death of Lady *Litchfield*. Lord *Litchfield* died in the year 1776, leaving Lady *Litchfield*, his widow, aged 69 years or thereabout. The plaintiff *Robert Crowe*, being then a young man about 22 years of age, and having pressing occasions for money, the defendant undertook as his agent, to sell the legacy to the best advantage; and informed the plaintiff that he had endeavoured to sell the same, but could get no higher offer than £300, for which he had sold the legacy to a Mr. *Toft*, to whom the plaintiff, on the defendant's representation, executed an assignment. In fact *Toft* was only a nominal purchaser, and the defendant really purchased the legacy. The money was paid by small sums between 1st of October, 1777, and the 23d Feb. 1778, to the plaintiff *Robert*, his brother, the other plaintiff, *George*, and to Mr. *Seally*, the plaintiff, *George's* tutor, viz. £30 to *George Crowe*, £100 to *Robert Crowe*, £20 to *George Crowe*, £50 in satisfaction of a draft of *Robert*, and to Mr. *Seally*, at different times £60, £10, and £49. 10s. which last payment however was contradicted by him in his evidence. Afterwards, in 1780, Lady *Litchfield* being likely to die, and the plaintiff fearing his sale of the legacy would come to the knowledge of his father, he applied to the defendant, and requested him to apply to *Toft* to know what sum, payable at the death of his father, *George Crowe*, sen. he would take for his interest in the legacy: when the defendant told him that *Toft* had quitted the kingdom, or was dead, and that his interest in the legacy had become the property of himself, the defendant, and pretending great friendship to the plaintiff, at length agreed to give up his right to the legacy, upon receiving the joint security of the plaintiffs *Robert* and *George Crowe*, for the sum of £1,800, payable at the death of *George Crowe*, sen. (who was then

S. C.

1 Ves. jun. 215.

2 Cor, 253.

Lincoln's-Inn
Hall, 13th July.

An agent employed to sell a reversionary legacy, buys it in the name of another, and afterwards sells it to the legatee, for a bond payable after death of his father, and then obtains from him a money bond: the whole transaction is fraudulent; and the giving the bond and payment of interest no confirmation.

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of the age of 63 years), whereupon a *post obit* bond was entered into, and executed by the plaintiffs to the defendant, dated 25th *April*, 1780, in the penal sum of £3,600, with a condition underwritten, reciting that the plaintiffs stood indebted to defendant in £900, conditioned for payment of £1,800, in case they or either of them the plaintiffs should survive the father, within three months after the father's death: but in fact no such debt of £900 subsisted at the time. In *Oct.* 1782, the plaintiff's father died, and the plaintiff *Robert* came into possession of a fortune of £3,000 a year, and in the month of *January* 1783, the defendant applied, for payment of the bond, but the plaintiffs being unable to pay it, and defendant threatening a suit, a money-bond was given for the £1,800, and interest at 5 *per cent.* bearing date 10th *Oct.* 1782; since when the plaintiff *Robert* had paid four years interest on the bond, to the month of *Oct.* 1786, and the defendant having sued out process to arrest the plaintiffs, they filed this bill, 18th *May* 1787, praying, that upon payment of the money really advanced, the defendant might be decreed to deliver up the bond to be cancelled, and might be restrained by injunction from proceeding at law, and therein charged that the legacy at the time of the sale was really worth, to a purchaser, £741. 12s. 8d. calculating the life of *Lady Litchfield* to be worth 6 years 1-8th purchase, and allowing the purchaser 5 *per cent. per annum* and compound interest for his money; therefore that the sum of £300 was £441. 12s. 8d. below the value.

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Mr. *Solicitor General*, Mr. *Lloyd*, and Mr. *King*, for the plaintiffs, stated the case, and the general value of the life, and the sums paid, to shew the inadequacy of the price given for it. They also insisted on the general rules of relieving persons who treated in this way for their expectations, and who were held by the Court entitled to its interference. That here the first transaction was manifestly fraudulent and unconscionable; 2dly, that the money-bond, though after the death of the father, could not be considered as a confirmation; that in order to be so, it should be done freely, and not under the influence of the prior transaction; for this they cited *Chesterfield v. Janssen*, 2 *Ves.* 125; *Cole v. Gibbons*, 3 *P. W.* 290. citing *Curwen v. Milner*, in the note on page 292; *Norris v. Rodd*, 16th *March*, 1779, where the plaintiff, in consideration of £2,000, sold to defendant an annuity of £435 for the life of plaintiff, payable upon the death of his father, (aged 71 years), if plaintiff and defendant should survive him: in *October* in the same year the father died, and upon the first payment becoming due, defendant applied for it, and plaintiff not being able to pay it, obtained from plaintiff a mortgage of his estate in possession and reversion, it being chiefly his mother's for life, for £4,212 (£4,000 being for the £2,000 really advanced, and £212 for the half year's annuity due:) in 1775, the plaintiff filed his bill, and was relieved against the grant, bonds, and mortgage.

Mr.

was of opinion, that such a limitation should be inserted. His Lordship declared that the uses were to be to *Thomas Naylor* and his heirs in tail male, with remainder to trustees to support contingent remainders; remainder to the heirs male of *Elizabeth Harrison* in fee, and if she should have no heirs male, then to the heir at law of the said testator in fee. Reg. Lib. A. 1789, fol. 632. See the notice taken of this by *Wilson, J.* and

Buller, J. in *Habergham v. Vincent*, post, vol. iv. and particularly by Lord *Eldon* in *Stansfeld v. Habergham*, 10 Ves. 280. Mr. *Vesey*, in a note (ib.) observes, that in a subsequent branch of this cause the *Master of the Rolls* noticed the inaccurate language of the decree as it stands in the Registrar's Book in the limitation to *Thos. Naylor* and the testator's natural son and his heirs in tail male.

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v.
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CAREY v. GOODINGE.

Lincoln's-Inn
Hall, 7th July.

GOODINGE, the testator, by will dated 10th June, 1783, gave to the defendant his brother *Henry Goodinge*, £500, and to his nephew, the defendant *Henry Goodinge, jun.* £500, and appointed them executors, but made no disposition of the residue. He also wrote a letter to the nephew, in which, among other things, he referred him to certain letters in *Chambers's* dictionary as *worth looking for*, and directed him to pay the plaintiff, *Carey*, £200.

Testator gave his brother and nephew legacies, and appointed them executors, but did not dispose of the residue. They were indebted to him in unequal sums; this is no release of the debts, and they are trustees for the next of kin, as to the residue.

Henry Goodinge, the brother, was indebted to the testator £7,000, and *Henry Goodinge, jun.* was indebted to him £1,000 at the time of his decease. Upon searching the titles referred to in *Chambers's* dictionary, *Bank* notes were found to a considerable amount.

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The bill was by the next of kin, and prayed an account of the personal estate of the testator, and particularly of the sums in which the executors were indebted to him, and payment of the same to the plaintiffs.

Mr. Solicitor-General, and *Mr. Mansfield*, for the defendants, contended: first, that the appointment of the brother and nephew executors, is an extinguishment of the debt. This is clearly so at law; and there is no case in this Court, where it has been held otherwise, except where there has been a direct gift of the residue. That was the case in *Brown v. Selwin*, For. 240, and even there, Lord *Talbot* spoke of it as an undecided point: but there is no case where it has not been held an extinguishment against the next of kin.

Second, that having (by this mean,) unequal legacies, and there being no disposition of the residue, the brothers as executors were entitled to it. That by appointing them executors, the testator had shewn his intention of giving them the personal estate: that he had not left it here to the mere appointment, as the letter to the nephew was not unimportant; the reference to the parts of *Chambers's* dictionary where the notes were found, is tantamount to saying,

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tion, vide *Carpenter v. Heriot*, 1 Eden, 338. *Stephens v. Lord Bateman*, ante, vol. i. 22. *Morse v. Royal* 12 Ves. 355. *Murray v. Palmer*, 2 Sch. & Lef. 486.

Roche v. O'Brien, 1 Ba. & Be. 330. *Wood v. Downes*, 18 Ves. 120. *Dunbar v. Tredennick*, 2 Ba. & Be. 304.

S. C.

1 Ves. jun. 227.

Lincoln's-Inn
Hall, 10th and
11th Dec. 1789.

Re-heard, Lin-
coln's-Inn Hall,
19th July, 1790.

Tenant in tail,
but restrained by
act of parliament
from suffering a
recovery, pays off
portions charged
on the estate,
without taking an
assignment; he
shall be a creditor
for the sums paid,
which shall be
raised for his ad-
ministratrix.

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The Countess Dowager of SHREWSBURY v. The Earl of SHREWSBURY.

THE Duke of *Shrewsbury*, in 1700, made a voluntary settlement of his estate, (after limiting it for the benefit of himself and issue) on *George Talbot*, father of the late Earl of *Shrewsbury* for life; remainder to trustees to preserve contingent remainders; remainder to the first and others sons in tail male, with remainders over; remainder to himself in fee, and made a will confirming the settlement. In 1788, the said *George Talbot* married, and a settlement was made, by which the estate was settled, as to the entail, according to the Duke's settlement, but there was a clause to raise £20,000 for daughters, by a trust term, created for that purpose. In 1719, the late Earl (who was the eldest son) was born. By a private act of parliament, 6 Geo. 1. 1720, the marriage settlement was confirmed, and the estate was settled on such persons upon whom the earldom should descend; and the act contained a clause that *Gilbert*, then Earl of *Shrewsbury*, the said *George* or *John Talbot*, should not alien, grant, or convey, the premises thereby settled, or any part thereof, and that every fine, alienation, &c. should be void: but the act contained a proviso that neither the first nor other sons of the said *George Talbot*, or of *John Talbot*, or the heirs male of their bodies, who should, within six months after he or they should attain the age of 18 years, take the oaths of supremacy and allegiance, and should from thenceforth continue a Protestant until he or they should attain his or their age or ages of 21 years, should be disabled from alienating the same: and the said act also contained a proviso, by which the said *George Talbot* was empowered, in case he should have issue a son, and also a younger child or children, by deed or will, to create a trust term of 99 years, for raising £15,000 for the portions of daughters, and £200 per ann. for each younger son. In June 1720, *George Talbot*, having a son born, executed the power, by deed, for raising these portions and annuities, by vesting a term of 99 years in Lord *Fitzwilliam* and *George Pitt*, and by will in *February* following, reciting that he had a son and daughter born, and might have more, (without taking notice of the deed) devised to other trustees, for a term of 99 years, to raise the portions and annuities. In the deed they were to be raised by rents, profits, or by sale or mortgage; by the will, by rents and profits only. *George Talbot* died in 1733, leaving several sons and three daughters, of whom *George* the eldest (the

late

late Earl) became seised of all the real estates, as first remainderman in tail under the settlement of 1718, and the act of parliament confirming it; but subject to the restriction in the act as to alienation, unless he should conform within six months after attaining 18 years of age, which he did not. The eldest daughter *Barbara* married the late Lord *Aston*, and before marriage executed a release of her portion of £5,000 on its being paid by the late Earl to the then Lord *Aston*, the father of her husband, and discharged the estate as well as released the Earl and the trustees from the same, but the Earl took no assignment of the charge. He also, in part, paid the portion of his sister *Mary*, who was married to the late Lord *Dormer*; which portions he paid out of his own money.

By indenture of demise of 2d July, 1751, reciting the act of parliament, and that the Earl had paid the portion of the said Lady *Aston*, and part of the portion of Lady *Dormer*, and that none of the said £15,000 having been raised under the term of 99 years, the said Earl was entitled to have such part of the same as he had advanced, paid and satisfied; and that *Matthew Robinson* (a party thereto) had contracted with the Earl at the sum of £1,000 for the purchase of a term of 40 years in the advowson of the parish church of *Bughfield*, part of the premises comprised in the 99 years term, and that the executors of Lord *Fitzwilliam* (who had survived *George Pitt*, his co-trustee) had been applied to join in demising the said advowson, which they had consented to, on condition that the said £1,000 should go in part-satisfaction of the £15,000 to be raised by the said term: the Earl and trustees conveyed the right of patronage to the said *Mathew Robinson* for 40 years. The Earl, after this deed, out of his own money, paid the remainder of Lady *Dormer's* portion, and also the portion of *Lacy* his younger sister; but took no assignment of their respective claims. The late Earl made his will, dated 12th June, 1747, (previous to several of these transactions) whereby, after ordering that such of his debts, for which no real security was given, should be paid out of his personal estate, and that those for which any real security was given, should be paid out of the real estates charged therewith, in ease and exoneration of his personal estate; and, after giving legacies and annuities, he gave all the rest and residue of his real and personal estate whatsoever and wheresoever, to his brother *Charles Talbot*, his heirs, executors, administrators, and assigns, and appointed him executor thereof. *Charles Talbot*, died in the late Earl's life-time. *George*, late Earl of *Shrewsbury*, died 21st July, 1787, without issue, and without revoking his said will, leaving the defendant *Charles Talbot*, now Earl of *Shrewsbury*, (son of the said *Charles Talbot*) his nephew and heir at law, and plaintiff his widow him surviving. The plaintiff, 6th September, 1787, took out letters of administration with the will annexed, to the late Earl, and possessed herself of his personal estate, and filed her present bill, praying that the portions paid by the late Earl

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Earl her husband, out of his personal estate, might be raised out of the 99 years term, for that purpose provided; and that all proper parties might join in raising the same; and that the same, when raised, might be paid to the plaintiff as widow and personal representative of the late Earl.

Mr. *Solicitor-General*, for the plaintiff.—Either tenant for life or tenant in tail, who shews his intention to keep alive the charge, may do so. The rule of the Court is laid down in several cases, *Kirkham v. Smith*, 1 Ves. 258. *Amesbury v. Brown*, 1 Ves. 477.

Length of time, without calling for an assignment, certainly is a species of evidence that he meant to give up the charge.

Here, not having complied with the act of parliament, within six months after attaining 18, Lord *Shrewsbury* was like a tenant for life, and his acts are to be reasoned upon in the same manner. His acts, with respect to the £1,000, are sufficient to shew he meant to keep the charge alive; the deed reciting that he was entitled to the money; and although a long time has elapsed, it cannot be imputed to him, as he was obliged to keep down the interest.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Graham*, for the defendant. There is no ground to call upon Lord *Shrewsbury's* real estate to pay off this charge, as there does not appear to have been any intention in the late Earl to keep it alive. The question is, whether the late Earl was tenant in tail or tenant for life only. Although, by the act of parliament, he could not alien the estate, he was, to all other purposes, tenant in tail; as such, he might cut timber and open mines; and, although he was bound to keep down the interest of the charge, it appears, from *Amesbury v. Brown*, that, if he takes it in, he may entitle himself as a creditor. His interest, in this case, was larger than that of a mere tenant for life; for if he had made a feoffment, or been vouched, it would have been no forfeiture, *Willion v. Berkley*, Plowd. 241. It is a common position, that where a tenant in tail pays off an incumbrance, it shall be a discharge of the estate, but where tenant for life does so it shall not; but although this has become a familiar rule, no reason has been any where given for it. It is allowed on all hands, however, that very slight circumstances will shew an intention that the payment shall be a discharge of the incumbrance on the estate. Then supposing him tenant for life, *quoad hoc*; if he were so, the circumstances are sufficient to shew he meant to pay the debt in discharge of the estate. He made a will, by which he gave the real and personal estate to his brother *Charles*, his heirs, executors, administrators, and assigns, under which it would have been indifferent in which shape this property went. The present Earl is
his

his son; and the late Earl, after the death of his brother, might not be aware that under the words *heirs, executors, administrators, and assigns*, the property would not still pass. The estate was to go, free from incumbrances, to the persons to whom he would wish it to descend, those who would take the honours of his family. From this circumstance, it is probable he meant it should go exonerated of the charge. Then, upon his own acts, what appears to be his intention? In 1742, he paid the first portion, *Barbara's*, which is the only portion which affords any evidence of his intention upon the subject. He might then have taken an assignment of the charge, or a personal receipt for the money; instead of that, he took a release to the estate charged: this shews he meant to discharge the estate. Then the deed of 1751 is very strong to the same purpose. The intent of that deed was, as he could not present in case of a vacancy, but the university would present, to do what those of his religion generally do—to sell the next presentation. The person concerned thought the best way was by a term of forty years, and to make use of the term of 99 years for that purpose, and the trustees very properly insisted, if they were to join, the money should go in discharge of their trust. It was not Lord *Shrewsbury's* intention to pay himself part of the money advanced, but the care of the trustees, which occasioned the recital. To shew that it was not his desire, a further sum was afterwards offered for an assignment of the whole term, which he refused: which proves he did not wish to have the charge paid off. And from 1741 to 1787, the time of his death, he shews no intent to reimburse himself the money advanced. Mr. *Solicitor* admits length of time will afford a presumption; then the question is, what length of time. In his case, there was 30 years from the payment of the last portion, and 45 from that of the first. In *Jones v. Morgan*, (ante, vol. i. p. 206.) 17 years only had elapsed in the life-time of the person who had paid the charge, and there was a circumstance, in that case, which operated to shew he meant to keep the charge alive, as he had kept the original bond by him uncanceled, all the time to his death, yet your Lordship thought the length of time sufficient. In a case so doubtful as that, and where your Lordship thought that, upon the whole, he was tenant in tail, though the case was, in truth, that of *Bagshaw v. Spencer*, (1 Ves. 142.) it could not be conceived to turn upon matter of intention in the party. In the present case, there is no circumstance to shew that the Earl meant it to continue a charge upon the estate. It stands entirely free from any circumstance of that kind. Owing to the mistake, with respect to the operation of the will, the widow possesses £50,000 of his personal estate. This is therefore not a case in which the Court will wish her to take £14,000 more, which the late Earl did not mean to go from his family.

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Lord Chancellor.—I am clear that the takers of the estates (notwithstanding the clause) were tenants in tail; and also, that where a term is outstanding in law, to raise a sum of money, and another person will pay that sum, *ex nomine*, that the person so paying has a right to stand in the place of the creditor.

If it is paid by the holder of the fee, the Court considers it as the debtor paying the debt, and therefore will not keep the term outstanding; but it will be a term to attend the inheritance, and he may make any use he pleases of it as such; but, as between his real and personal representative, it will, in the hands of the heir, be a payment of the debt by the debtor.

But the Court has gone further, for in the case of tenant in tail, where there are remainders beyond to other persons, it is not so distinctly the debtor's paying the money; but the Court has treated it in the same manner, because he is competent to make the estate a fee, therefore he is said to represent the fee. In that view, the Court considers the payment by the tenant in tail, the same as if it was paid by the tenant in fee, and the term shall attend the inheritance; but if the tenant in tail gives a demonstration that he intended the term to be burthened with the debt, it shall remain charged; but it requires proof, on his part, to shew that the term is outstanding.

Where a tenant for life pays a debt charged on the inheritance, which he cannot make his own, he stands in the place of the creditor; but, from considering the circumstances in which the estates are limited, a presumption may be raised, that though he paid off a charge upon an estate, which he had for life only, *circumstances may be laid before the Court, to shew that he meant to discharge the estate.* Therefore, *from the situation of the estate*, it shall be presumed, that he meant to pay the debt or not.

Taking this as the rule, the act of parliament has settled these estates in inheritance unbarrable. Every taker takes, under it, an estate of inheritance; but the act contains a prohibition of alienation. With respect to the interest, it might be a question, whether it would not be contrary to the faith under which he holds it, for any taker to suffer a charge to remain on the estate.

The rule laid down applies to the case at bar, as strongly as to any estate for life.

The person for whom the charge is to be raised, has no remedy for the interest against the estate; but if the personal estate of the tenant in tail was sufficient, the Court would make it pay, because it was a fraud not to keep it down. A tenant in tail, holding under the restrictions in the act, could not alienate by enlarging the estate. The estate of the tenant in tail (as of tenant for life) must therefore keep down the charge.

Then, as he could by no means make the estate his own, it makes it equal to him as if it was an estate for life. By paying

the charge, he pays a debt upon a fund which he cannot make his own.

Then the question is, whether there are circumstances, in this case, to shew that he meant the estate to be discharged.

I still lay it down to belong to those who would exonerate the estate, to shew that it was to be exonerated.

Then, in 1742, he pays off £5,000, the fortune of the sister married into the family of *Aston*, and takes a release from her, to shew that she did not take the money *aliundé*. It is a discharge, against her, to Lord *Shrewsbury*, and the trustees.

But it is discharged by the payment of Lord *Shrewsbury*. Nobody has contended it would be impossible for Lord *Shrewsbury* to claim it.

Accordingly, in 1751, another transaction takes place, which would otherwise have been a fraud upon the estate. It was understood by the parties to that transaction, that the sum paid by Lord *Shrewsbury* was a sum, in which the estate was indebted to Lord *Shrewsbury*.—Then Lord *Shrewsbury*, as tenant for life, meant to sell the advowson for 40 years (if his three sons should so long live) to secure a presentation; and that it might not be determinable on the death of Lord *Shrewsbury*, it was done out of the term of 99 years, in trustees, which did not depend on the life of Lord *Shrewsbury*. The trustees insisted that the money paid, should be so upon the recital, that the whole was due to Lord *Shrewsbury*. This is a proof that he did not consider the estate as exonerated. There is no kind of presumption, arising from this transaction, that he meant to pay the charge to the parties: it was considered he might do what he pleased with the money. Then, it is said, that the length of time which has elapsed, shews that he meant to discharge the estate, and it is assimilated to a waiver of a right. Where a man out of possession acquiesces, and the acquiescence is accompanied with circumstances not otherwise to be accounted for, but by presuming such an intention, it must be presumed; but here the intention only was, that money which would bear 5 per cent. interest should be paid off. It seems to be the case of money, paid by a person not liable to pay it, in discharge of the estate, unless there is proof that he meant to discharge it. For nine years, it appears, he did not mean to discharge it; and, since that time, it stood doubtful what his intentions were.—The money must therefore be raised, as prayed by the bill.

This cause was re-heard at *Lincoln's-Inn Hall*, the 19th July, 1790, when Mr. *Solicitor-General* and Mr. *Mitford* were heard for the plaintiff—Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Graham*, for the defendant—but nothing material was added to the former argument; and Lord *Chancellor* continuing of the same opinion,

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both on the general principle and the particular circumstances of the case,

The decree was affirmed (a).(a) This case was cited in the late application to restrain the Duke of Marlborough from committing waste on the estates at *Blenheim*, settled by

Act of Parliament, which will be reported by Mr. Maddock. The Court, however, did not consider it as materially affecting the question.

In Court, Hilary
Term; re-heard
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Hall, 19th, 20th
July, 1790.

HUTCHESON v. HAMMOND.

F. W. having an estate, which came to her *ex parte maternâ*, on her marriage conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs: By will, she directed the estate to be sold, the money to be laid out in the funds, and the trustees to permit the husband to receive the interest for life; then, (after the deduction of £3,500 to uses which vested in the plaintiff *A. J.* and after payment of £1,000 to *G. P.*) to pay the residue of the purchase-money to the three defendants *H.* By codicil she gave the plaintiff her husband a power of appointing the £3,500, in case *A. J.* should

BY indentures of lease and release; the release tripartite, dated 9th of *August*, 1777, and made between *Frances Hutcheson* (then *Frances Weeks*) of the first part; plaintiff, *William Hutcheson*, of the second part; and *Peter Hammond*, esq. one of the defendants, and *Isaac Baugh*, deceased, of the third part; certain lands, &c. situate in the parishes of *Chew Magna* and *Dundry*, or one of them, in com. *Somerset* (which descended on the said *Frances Weeks ex parte maternâ*), were conveyed to the said *Peter Hammond* and *Isaac Baugh*, their heirs, &c. to the uses following, *viz.* to the use of the said *Frances Weeks* (afterwards *Hutcheson*) till the then intended marriage; and, after the marriage, in trust for and during the natural life of the said *Frances Weeks* (afterwards *Frances Hutcheson*), to pay unto, or permit her to receive the rents, &c. to her sole or separate use; and from and after her decease, to the use of such persons, &c. as she should, from time to time, notwithstanding her coverture, and whether sole or married, by any writing or writings under her hand and seal, dated in the presence of, and attested by two or more credible witnesses, or by her last will and testament, or by any writing purporting to be her last will and testament, to be by her duly signed, sealed, and executed, in the presence of three or more credible witnesses, should direct, limit, or appoint; and in default of such limitation, &c. to the only proper use of the right heirs of the said *Frances Weeks*, for ever.

The marriage took effect between the plaintiff, *William Hutcheson*, and *Frances Weeks*; *Frances Hutcheson*, by virtue of the power so given to her, and of all other powers and authorities in her being, by her last will and testament, and appointment in

marry without his consent. *G. P.* died, living the testatrix, before the codicil made, but *F. W.* in the codicil took no notice thereof. 1st. The £1,000 is real, not personal, and shall not go to the executors of *G. P.* (though given to her executors), nor to the personal representative of the testatrix, nor yet to the residuary legatee of the purchase-money, but to the heir at law, *ex parte maternâ*, (the side from which the estate came.) 2d. The £3,500 is vested in *A. J.* and the trustees having laid out a larger sum by £17, with intent to appropriate, it is well appropriated; and *Ann Jones* having married once, with her father's consent, his power is gone; and he consenting to give up his life interest, it was directed to be paid to the trustees in her marriage settlement.

writing

writing, dated the 19th of October, 1778, executed by her, and attested by three witnesses, did direct, limit, and appoint, unto the said *Peter Hammond* and *Isaac Baugh*, all her messuages, &c. as aforesaid, to hold the same to the trustees, their heirs, &c. in trust, after her decease, to sell the same; and, after deducting £100 each for themselves, to lay out, and invest the rest and residue of the money to arise by the sale, in the funds, and permit the interest to be received by plaintiff, *William Hutcheson*, her husband, during his natural life; and after his decease, to pay and dispose the principal money as follows, viz. to pay to the plaintiff, *Ann Jones* (therein called *Ann Hutcheson*) and *Walter Hutcheson*, since deceased, the two youngest children of *William Hutcheson*, the sum of £1,500 a-piece; but if either of them should happen to die before his or her said legacy should become payable, then in trust to pay the legacy of £1,500 of him or her so dying, to the survivor of them, his or her executors, administrators, and assigns; and to pay £500, other part of the said principal money, to her cousin, *Elizabeth Parker*, spinster, if living, at testatrix's husband's death; and if not then living (which was the case) to pay said £500 to plaintiff, *Ann Jones*, her executors, &c.; and to pay £1,000, other part of the said principal money, to Mrs. *Grace Parker*, of *Healing*, com. *Surrey*, spinster (who died in the testatrix's life-time), her executors, &c.; and in trust to pay all the residue of said principal money, together with the interest or dividends which might be due thereon, unto the three youngest sons of Mr. *William Hammond*, late of *London*, Turkey merchant, to be equally divided between them, share and share alike; but if any or either of them should happen to die, then to the survivors or survivor of them; and if all should die before the same be payable, then to said *Peter Hammond*, his executors, &c.; and, after giving some trinkets and wearing apparel, and also giving directions as to her burial, she nominated and appointed her said husband, the plaintiff, *William Hutcheson*, executor and residuary legatee of her personal estate, over which she had any disposing power.

Walter Hutcheson, one of the legatees, died in the life-time of the testatrix; and, after his decease, she, by virtue of the aforesaid and all other powers in her being, duly made and published a codicil to her said will, dated the 13th of June, 1783, and after reciting that the said *Walter Hutcheson* was dead, whereby plaintiff, *Ann Jones*, would become entitled to the said several sums of £1,500 each, and also to the sum of £500, in case of the death of the said *Elizabeth Parker*, before the decease of plaintiff, *William Hutcheson* (and which hath since happened); the testatrix willed, that if plaintiff, *Ann Jones*, should, in the life-time of plaintiff, *William Hutcheson*, intermarry without the consent of plaintiff, *William Hutcheson*, in writing under his hand first obtained, her trustees should pay and apply the said two several sums of £1,500 each, and also the said sum of £500, in case of the death of

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of said *Elizabeth Parker*, unto such persons, &c. as said *William Hutcheson* should, by his will, appoint; and in all other respects she thereby confirmed her said will. At the time of making this codicil, *Grace Parker* was dead, as well as *Walter Hutcheson*, and was known by the testatrix so to be.

Frances Hutcheson died the 17th of November, 1783, without revoking or altering her said will and codicil, leaving plaintiffs, *William Hutcheson* and *Ann Jones*, her surviving. *Elizabeth Parker* is since dead, in the life-time of *William Hutcheson*: and *Walter Hutcheson* and *Elizabeth Parker* being both dead, *Ann Jones* became entitled (subject to the life-estate of plaintiff, *William Hutcheson*) to the sums of £1,500, £1,500, and £500.

After the death of the testatrix, the trustees sold the estate for £6,500, and conveyed the same to the purchaser the 22d of October, 1784, and having paid all costs, &c. and retained £100 each, given to themselves by said will, there remained in their hands the sum of £6,252. 6s. 2d. being the residue of the money arising from the sale.

The trustees invested £2,695, in the purchase of £4,900, 3 per cents. but kept back £3,500, to be invested to answer the amount of the legacies given to plaintiff, *Ann Jones* (subject to the life of plaintiff, *William Hutcheson*) in case the trustees be justified in so doing.

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The plaintiff, *William Hutcheson*, made several applications to *Peter Hammond*, the acting trustee, to lay out the sum of £3,500 in the funds, and several letters passed on the subject; the result of which was, that the trustees were desirous that the money should be laid out and appropriated to the purpose of answering the legacies; and accordingly that sum, with £17. 10s. (in order to make the stock purchased an equal sum) was laid out, by the broker of the trustees, in the purchase of £6,400 3 per cents. of which notice was given by *Hammond* to plaintiff *Hutcheson*, in a letter of November 5, 1784; but no declaration of trust was made by the trustees, *Hammond* advising the father not to put himself to that expence.

The plaintiffs, *Philip Jones* and *Ann*, his wife (then *Ann Hutcheson*, the before-named *Ann Jones*) intermarried together, with the consent of plaintiff, *William Hutcheson*, her father, in writing under his hand for that purpose first obtained; and by indenture the 3d of April, 1787, previous to the marriage, it was agreed, their proportionable share of the stock should be conveyed to the father, and other trustees, to the uses of the marriage.

The bill prayed, that it might be declared, that the trustees under the marriage settlement of *Philip* and *Ann Jones*, were entitled to the 3 per cent. annuities purchased with the £3,500, upon the trusts of the settlement, and that the stock might be transferred to them accordingly; and the plaintiff *William* might be declared entitled

entitled to the sum of £1,000, intended for *Grace Parker*, and that the same might be paid to him.

Several questions arose—

First, As to the £1,000 legacy charged on the land for *Grace Parker*:

First, Whether it resulted as land unsold; and, if it did, whether it was to go to the heir *ex parte paternâ*, or *ex parte maternâ*:

Secondly, If not, but it was to be considered as money, whether it should go to the plaintiff, the husband, as executor and residuary legatee of the *general residue*:

Or, Thirdly, whether it should go to the children of *William Hammond*, under the gift to them of all the money arising from the estate, not before disposed of.

Second, As to the £3,500:

First, Whether what has been done amounted to an appropriation.

Secondly, Whether, if it had, such appropriation could be made without the consent of the persons who might ultimately become entitled, on the contingency of its becoming forfeited by a marriage without consent, and no appointment made by the plaintiff, *William Hutcheson*, pursuant to the power in the codicil.

This last question introduced another, not foreseen by the counsel, nor spoken to, though the judgment of the Court partly turned upon it, *viz.* Whether the condition in the codicil was a good cause of forfeiture, in the event that had happened, of plaintiff *Ann* having married with the consent of the father, in case she should, on the death of her present husband, marry again, in the life-time of her father, without his consent.

Mr. Solicitor-General, Mr. Lloyd, and Mr. Pemberton, for the plaintiffs.—The legacy of £1,000 is lapsed, and if so, according to the intention of the testatrix, it goes to the plaintiff, *William Hutcheson*, as residuary legatee. The mere circumstance of the additional words, “her executors, administrators, and assigns,” will not be sufficient to transmit the legacy to the personal representative of the legatee, dying in the life-time of the testatrix; it was so held in *Maybank v. Brooks* (ante, vol. i. p. 84.) But it is said, here is an additional circumstance, arising from the silence of the testatrix, who, in the codicil, makes a disposition of a legacy which she had given to another deceased legatee, but takes no notice of *Grace Parker*, though she knew of her death; which imports, that she meant the words “executors and administrators” should have their due operation; but that is impossible, because it would be straining the intention too far; and that circumstance is favourable to the residuary legatee. The testatrix must have considered, that the property arising from the real estate would pass to her husband, as the residuary legatee. The principle of this Court is, that

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that where money arises from the sale of land directed to be sold, it has never been held personalty, unless directed by the testatrix to be disposed of as such; it is apparent, on the whole of the will, that the word *money* is absolutely meant to include money arising from the sale of the real estate. There are many such cases; and, in the present case, there are numerous circumstances to induce the Court to believe, that the testatrix meant every thing she could dispose of should go to her husband, as her residuary legatee; as in *Durour v. Motteux*, 1 Ves. 320. *Mallabar v. Mallabar*, For. 78. She had no power but on this estate, which she ordered to be sold; this, and the making the husband residuary legatee, are strong circumstances; her directing it to be turned into personalty, and, by a subsequent codicil, confirming the will, and appointing her husband executor and residuary legatee of her personal estate, over which she had any disposing power, are much to be relied upon.—2. With respect to the question of appropriation, the plaintiffs, the father and daughter, are entitled to the appropriated sum. It was a vested interest in them at the death of the testatrix, subject to no contingency. But whether absolute or contingent, if the fund was clear of debts, the appropriation was right by the rules of the Court. The testatrix meant the fund should be productive to the parties entitled under the will; it was directed to be laid out as soon as the estate was sold; application was made for that purpose, and an agreement, that it should be laid out; the parties are therefore bound, whether there be a fall or rise of stock. The letters are all to that purpose; had there been an instrument executed, whereby the parties had declared that, whether this should be an appropriation or not, should depend on the opinion of the Court, still it would have been an appropriation. In the case of a legacy given to an infant, where the executor is satisfied that the fund is clear of debts, he may invest it in the funds; and, having done so, and put it out of his own power, should money be lost by the failure of the funds, the party intrusted cannot charge the executor, he having done no more than the Court would have ordered, if a bill had been filed. The residuary legatees had nothing to do with it: the Court will appropriate where they are not parties to the suit, *Green v. Pigott* (ante, vol. i. p. 103.) The parties here were certainly in a situation to call for an appropriation; and the question is, whether an absolute one was made or there was only a treaty for it; had a bill been filed, the Court undoubtedly, would have done it; whether the interest of the parties were absolute or contingent, the Court would have impounded the property.

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Mr. *Mansfield* and Mr. *Stainsby*, for the defendants, the *Hammonds*, the legatees of the particular residue—This will is an execution of a power, by which the testatrix is said to have appropriated this £1,000 to *Grace Parker*, her executors, administrators
and

and assigns, and then added a codicil, by which she confirmed her will. Mr. *Hutcheson* claims within the terms of that appointment, as executor of *Grace Parker*. In *Maybank v. Brooks*, it was held otherwise as to the interest of the particular legatee. It seems to have been the intent of the testatrix, to give the whole of the money arising from the sale, and undisposed of, to the residuary legatee of that fund. Questions have arisen, in such cases, between the heir at law and the residuary legatee, where particular legatees have died, as in *Ackroyd v. Smithson* (ante, vol. i. p. 503. 2d edit.) In such cases, the next of kin has claimed it as money; but the heir has always said, at the death of the testator it was real, and must continue so: and if money has been raised by the sale, it must result to the heir at law. *Durour v. Motteux*, 1 Ves. 320. was a gift of the residue of such money as should arise from the sale of real estate, and the same thing, in fact, as the gift of money, and the residuary legatee took the whole. There is no case in favour of the heir at law, where it has been held to result. Here the legatee was dead, previous to the testatrix making the codicil; and her saying in that codicil, that she confirms her will, amounts to a re-publication. So in *Gibson v. Ld. Montfort*, 1 Ves. 493. Upon the effect of this codicil, the three *Hammonds* are clearly entitled to the residue.—2. With respect to the appropriation, the question is, whether any appropriation has been really made. From the language of the letter, there is no reason to think it an appropriation. There are two modes of making an appropriation: the trustee may secure it by a declaration of trust, or the £3,500 might have been transferred to the trustees, in Mrs. *Jones's* marriage settlement. No such thing has been done; on the contrary, the letters say, nothing can be done but by an application to a court of equity; in fact, an appropriation, without the approbation of this Court, is no appropriation.—In *Duke of Montague v. Lord Godolphin*, 2 Ves. 61.* *Bennet v. Holgrove*, cited in *Hurst v. Ld. Winchelsea*, 2 Bur. 879. and *Ld. Montague's* case, *Canc.* 1755, Lord *Hardwicke* considered an appointment under a power to operate, not as a will, but merely as a power; so, in this case, we claim under the appointment, as nominees, by way of substitution.

Mr. *Mitford* and Mr. *Richards*, for the other defendants,—There are three points:—First, whether the plaintiffs have a right to an appropriation.—Second, whether an appropriation has been actually made.—Third, with respect to the £1,000 to whom it now belongs. It is claimed by three parties: First, by the plaintiff, insisting that he takes it under the disposition made by the wife: Secondly, by the representative of *Grace Parker*: Thirdly, by the heirs *ex parte paternâ* & *ex parte maternâ* of the testatrix. The position laid down for the plaintiffs cannot be taken as true,

* It was probably cited in the argument, but does not appear in the report.

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to the extent to which it is laid down. It must be allowed, that where a testator leaves several legacies, some to one, and some to another, and then gives a residue of his personalty, the Court has two motives, one for the safety of the legatees, the other for the purpose of ascertaining the residuary fund. If a legatee comes into Court and says, though my legacy is not payable immediately, I have yet a right to have it secured; the Court has of late years appropriated the legacy: but Lord *Hardwicke* doubted whether a contingent legacy could be so secured: 1 Atk. 505. 3 Atk. 101. both which cases are cited in *Green v. Pigott*. Of late times, whether a legacy is payable at a certain time, or contingent, the Court will secure it; but it has never done so where the whole is given to *A.* for life, and after the death of *A.* to several, without the consent of the residuary legatee; for that would be a deviation from the will. Here, as the parties were infants, there could be no such consent. There is no case where the Court has said that the person entitled to the principal after the death of *A.* shall have a right so to apply as to take the chance of the stocks: for such a right must be mutual. Nothing done by the trustee can prejudice the right of the *cestui que trust*: the trustees saying they would lay out the money can have no effect.—As to the £1,000 Mr. *Hutcheson's* claim has no foundation; it could not pass as personalty. *Durour v. Motteux*, and *Mallabar v. Mallabar*, were decided on the ground of the real and personal estate being blended so as to make one fund; and as the party could take nothing but personal estate, the heir could have nothing to take. In *Mallabar v. Mallabar*, by the words “personal estate,” the money to arise from the real estate was intended to pass, as appeared from the words of the will. The £1,000 undisposed of falls into the residue, as being undisposed of; the will and codicil may be considered as two instruments referring to each other. *Potter v. Potter*, 1 Ves. 437. and *Jackson v. Hurlock*, (ante, vol. i. p. 61. note, 2d edit.) were cases of re-publication. The only doubt has been, whether a codicil, of personalty merely, should affect a will of realty, so as to operate as a re-publication: which doubt has, by both those authorities, been removed, and the distinction over-ruled. Every residue of this kind is a residue of all that is not *effectually* given.

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Mr. *Graham* for the heir *ex parte maternâ*.—The £1,000 being lapsed by the death of the legatee in the life of the testator, is part of the old reversion. A limitation to the right heirs of the settlor is always considered as part of the old estate: a lease and release, passing nothing but what is expressed; not like a fine, which operates by transmutation of estates. It is agreed that the real estate might be blended with the personal, and agreeably to the cases of mixed funds, might pass by the will; and for this purpose *Mallabar v. Mallabar* is cited. There is no doubt that, in that case, it was considered as a mixed fund. It was a devise to

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sell, and the residue given to the sister, by a sweeping clause, by which the testator meant that all that should drop should go to the sister. In that case evidence also was read which determined Lord Talbot's mind on the subject. In *Motteux v. Motteur*, (*Durour v. Motteur*) 1 Vern. 320. there were circumstances to shew it was intended as a mixed fund, and that there was an intention to dispose of the realty as personalty. We come now to cases which decide the point, that where money is to be raised out of a real fund, and the legacies fail by the death of legatees in the lifetime of the testator, the residue is a specific residue, and does not comprise the lapsed legacies, *Cruse v. Barley*, 3 P. W. 20. and the cases cited by Mr. Cor, in his note of *Digby v. Legard*, and *Ackroyd v. Smithson*, (also reported ante, vol. i. p. 503.) in which Lord Chancellor approved of the case of *Digby v. Legard*. In *Hewit v. Wright*, Dorothy's share lapsed, and as such became part of the residue. It was held that it was converted; and being undisposed of as personal estate, was comprised in the residuary clause. Here the codicil gives operation to the will. It is impossible to contend where a codicil is made for a particular purpose, that if it refers to the will, it will not re-publish the will, *Acherley v. Vernon*, 1 P. W. 783. but there must be words in the will to pass the lapsed interest. The question is, whether by the confirmation of the will in the codicil, the residue, containing the £1,000, passed. In *Doe*, on the demise of *Norris v. Cubit*, Doug. 31. there were words sufficient to pass the interest. *Potter v. Potter*, 1 Vern. 437. had also sufficient words to pass the intermediate interest. All these cases are where the words were sufficient. Then the question is, whether there are sufficient words in this will to speak in the year 1783. There must be express words to disinherit an heir at law, or a necessary implication that the estate must pass. But there is nothing here to alter the original devise, if the words "rest and residue," in the original will, were not sufficient to pass the £1,000. The words are, to pay £500 to *Ann Parker* if living, if not to *Ann Hutcheson*, and to pay £1,000 to *Grace Parker*, her executors, administrators, and assigns; to pay the rest and residue to the three sons of *Hammond*. It cannot be contended that the £1,000 comes within the gift to the executors, administrators, and assigns of *Grace Parker*. In *Maybank v. Brooks*, (ante, vol. i. p. 84.) the legacy was held not to pass to the executors, &c. although the testator knew at the time of making the will that the legatee was dead. The testatrix thought here either that the executors would take, or that it was good as an appointment; and by the codicil confirms the will in all other respects: she could not therefore mean the residuary legatee to take the residue, including the £1,000, but meant to refer to the will as it stood, in which the legacy was given to *Grace Parker*, her executors, administrators, and assigns.

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Mr. Simeon, on the part of the heir *ex parte paternâ*, contended, First, that this was not money but land unsold. All the cases prove this proposition, that where land is to be sold for a special purpose, which cannot be carried into execution, it shall be considered as land; that, even if converted, it is still land, in a court of equity. The question always is, whether you can collect from the circumstances that the testator meant to convert his real estate into personalty. If he did, it must be disposed of either by the particular legacy, or by the residuary clause. This was the ground of decision in *Mallabar v. Mallabar*, and *Durour v. Motteur*: there it was intended to be a mixed fund, and the real and personal funds were blended. The distinction attempted between the case, where the question was between the heir and residuary legatee, upon the lapse of a *particular legacy*; or where it was between the heir and next of kin, upon the lapse of *such a* legacy where no residue was given; or upon the lapse of a residue or part of it, when the question would still be between the heir and next of kin; could not be supported. *Cruse v. Barley*, and *Ackroyd v. Smithson*, were cases between the residuary legatee and the heir upon the lapse of a particular legacy charged on land; and it was decided to be a resulting trust for the heir. And in *Ackroyd v. Smithson*, Lord Thurlow applied the rule laid down in *Digby v. Legard*, where the case was decided as between the next of kin and heir, which shews the distinction is of no avail; but that, in both cases, the only question is the intention to convert, and that (in case there is no intention *absolutely* to convert) the heir shall take. In *Robinson v. Taylor*, (ante, vol. ii. p. 589.) *Ackroyd v. Smithson* has been confirmed and approved. The codicil makes no difference in the question; for though it confirms the will, and thereby deduces the date of the will to that of the codicil, it does not necessarily pass the real estate; it only gives a capacity to the will to pass it, if the testatrix intended to pass it. The doubt raised into which residue it should fall, shews that no intention could be clearly found. As to the intention to pass the £1,000 which remained land unsold, without any indication in the codicil that it was to become personalty; it could not fall into the *general* residue, nor could it fall into the particular residue, which was to consist of money to arise by the sale after the £1,000 was paid out of it. The circumstance of giving by the codicil the £1,500 and £500 legacies, which had lapsed, and being silent as to the £1,000 which the testatrix knew was also lapsed, shewed she meant either not to dispose of it, but let it result, or that she had forgotten it, which, on a question of intention to give, must have the same effect. It frequently happens, a person may die intestate as to part, though a general residue is given, in cases of pure personalty, as appears by *Davers v. Dawes*, 3 P.W. 40. *Cooke v. Oakley*, 1 P.W. 302. Upon devises of *land* a lapsed devise will not fall into the residue, but result to the heir:
and

and the money here being to be considered as land, must be taken as a devise of the land itself, and must go to the heir, who is never to be disinherited by implication.

Secondly, considering the £1,000 as land; the heir under the deed is to take as a purchaser; and then the heir *ex parte paternâ* must take. It is not a resulting trust, but an express disposition. A disposition by lease and release operates by transmutation of possession. It puts the interest out of the grantee. Here she reserved a power of disposal: but in default thereof, it was to go to her right heirs, not to herself and her heirs; if so it would have been to the old use; but the use being put out of herself, her right heir was to take by purchase; and then that heir must be the heir *ex parte paternâ*. In *Comyn's Digest*, the cases are strung together. Where a man seised in fee, puts the fee out of himself, and declares no new use, it shall be to the old use: but if tenant in tail suffers a recovery without any use declared, it operates to give him a new estate in fee, and, however he held before, would make a *descent ex parte paternâ*. The trustees in this case must convey to the heir; for that purpose they must have the whole fee. Here is a springing use, to take effect at the settlor's death, to her right heirs. But it is said, that a person cannot make his right heir a purchaser; this is true by will but not by deed; and where the grantor puts the whole estate out of himself, the heir must take by purchase. In *Hurst v. Morgan*, which went from this court to the *King's Bench*, and is mentioned in *Sir James Burrow's Reports* as 2d May, 1755, a feme covert, on her marriage, conveyed by lease and release to trustees in fee, to the use of herself for life, with power to appoint, &c. in default to her right heirs. This was held a limitation to the heir by purchase, and that the descent was broken. In the cases of money to be laid out in land, and settled to uses, with the ultimate remainder in fee to the right heir of the devisor, the conveyance must be made to the heir as a purchaser. I took that distinction in *Lady Tweeddale v. Lord Coventry*, (ante, vol. i. p. 240.) and it was admitted by Mr. Kenyon, Attorney-General, who said it had been decided by Lord Henley, in *Robinson v. Knight* (a), (which he cited from Mr. Ambler's note) if the conveyance was to be made to the heir as a purchaser, or an use would spring in him to make him take by purchase, the operation of the legal estate would not be prevented by any consideration from whence the equitable estate came; but the estate would go beneficially to the heir to whom it came, for his own use, and not as a trustee for the use of the heir *ex parte maternâ*. By *Alston v. Wells*, Doug. 771. there is no equity between the paternal and maternal heir, *Balch v. Putt*, Trin. 8 Geo. 3. cited there. This doctrine is recognized in *Wade v. Paget*, (ante, vol. i. p. 363.) where it is held that the legal estate shall direct the descent.

(a) Since reported from Lord Northington's MSS. 2 Eden, 155.

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Mr. Mansfield, in reply, for the residuary legatees of the money to arise from the sale.—First, if this question was to rest solely on the will, the £1,000 must belong to the three *Hammonds*; (the specific residuary legatees) because where money, as money, is given to particular legatees, and the rest to residuary legatees, and a part of the money lapses by death, the residuary legatees will take that increase. In *Cooke v. Oakley*, it was clear the testator did not mean to dispose of the leasehold estate. In *Cruse v. Barley*, so far from the contrary being determined, that which I contend for was laid down as a clear point. The question was as to the £200 given to *Christopher*, which never vested. If *Christopher* had been dead at the time of making the will, it would have fallen into the residue. The difference is plain: where it lapses in the life of the testator he supposed to know it; and whatsoever lapses goes to the residuary legatee. No answer is given to the case of *Durour v. Motteux*. *Digby v. Legard*, was a gift of a residue: the testator was considered as dying intestate as to the lapsed share. *Ackroyd v. Smithson*, is an instance of a lapsed legacy. *Wright v. Hewit*, does not impeach the doctrine. With respect to the codicil, it is determined it will re-publish the will, *Acherley v. Vernon*. But it is said, that it will not operate without specific words to dispose of the lapsed property. I take the effect of it to be, that if there be any words in the will to dispose of the residue, the codicil will carry the lapsed interests. *Gibson v. Lord Montfort*, 1 Ves. 485. *Potter v. Potter*, 1 Ves. 437. and that it is just the same as if the will was written over again. On this principle it is that after-purchased lands will pass. It is the same as if the will was copied, with the omission of the £1,000.

Mr. Solicitor-General, in reply, for the plaintiff, the general residuary legatee.—It will be difficult for me to contend, what I must contend, that this is to slip through the first residue, and fall into the second. If the £1,000 lapsed under the will, and the codicil was held to re-publish it; it might be contended that the words would operate as a confirmation of the will. The questions in the cause, I suppose, are,

First, whether the plaintiffs are entitled to the last alternative in the prayer of the bill: that, if no appropriation has been hitherto made of the £3,500, the father giving his consent, the sum may be now paid. It is said, her £3,500 cannot now be appropriated. Mr. Mitford says, that great mischief would arise if the trustees could appropriate when the funds are low, against the residuary legatee: but the Court does not consider the funds as varying in value; and the decision must be the same respecting stock, or where money is in the Bank, or upon mortgage. He says the tenant for life is to have the interest for life; and the other parties to have liberty to apply upon his death: but the Court will order the money to be laid out earlier, upon the consent of the tenant for

for life, *Green v. Pigott*, (ante, vol. i. p. 103.) *Gawler v. Standewicke*, where it was determined that if a personal fund be provided, the Court will secure it, but will not raise it out of land. The case of *Phipps v. Annesley*, 2 Atk. 57. was there recognized: but where it is personal estate the Court will appropriate. It will secure the fund, whether the legacy be vested or contingent. In *Cooper v. Douglas*, (ante, vol. ii. p. 231.) the Court said it was no appropriation, because the executrix was to have an advantage in it. But here Miss *Hutcheson* might have come and had an appropriation during the life of the father. The case of *Green v. Pigott*, and the ordinary course of the Court, prove this.

The second question is, whether the trustees could appropriate without the consent of the Court. In *Trafford v. Boehm*, 3 Atk. 440. it is laid down, that there is no necessity for a decree of the Court; that though the parties may come here for the security of the trustees, it will be an appropriation, though not done by the Court. The will, in this case, had given this lady a legacy in which she had a vested interest, subject to the father's life: by the codicil a condition was annexed, of marrying with consent, with remainder over. The father could not bar himself of the right of appointment; if he appointed, there was a remainder over. If the father made no appointment, the £3,500 would fall into the residue. It has been held, that a mere devise of a residue will not make the condition of marriage with consent effectual. In *Amos v. Horner*, 1 Eq. Abr. 112. it was held sufficient: but that has been denied to be law, *Paget v. Heywood*, cited 1 Atk. 378. and *Wheeler v. Bingham*, 1 Wils. 135. Here, the father is entitled to the interest for life; and at his death the daughter, having married with his consent, would take the principal, unless a second marriage, without consent, would bar her from so doing: but it could not be intended to extend the condition to a second marriage. With respect to the appropriation; the argument has confounded the right of appropriation with the right of payment. This is a sum of £3,500, the interest payable to the father for life; the principal afterwards to the daughter, or, in a certain event, as the father should appoint. The residuary legatees have no claim. The legatees have a right to an appropriation. Here the parties interested, called upon the trustees to appropriate, when the stocks were low, and the trustees directed the £3,500 to be laid out separately.

Mr. *Graham*, in reply, for the heir *ex parte maternâ*.—I contend, upon principles, that this is the old reversion. The conveyance by lease and release, operates only by virtue of the statute of uses. The estates of persons *in esse*, only, are executed. The fee remains in the feoffees, to serve the springing uses. All the cases shew, that wherever, either by deed or will, the grantor gives a reversion to his own right heirs, they take by limitation, not by purchase.

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purchase. What would be the consequence of their being taken as words of purchase? That a limitation, by the wife to the husband for life, remainder to children, in such shares as they should appoint, with a remainder to her right heirs, would take the fee out of her during her life : whereas, all the uses, not parted with, must remain in her.

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Mr. Justice *Buller* (after stating the case—The question arises upon the legacy of £1,000. To this five claims are set up. The first is by the plaintiff *William Hutcheson*, as executor of *Grace Parker*; for this there is no foundation. I agree with the counsel, that having, by the codicil, confirmed the will, it must be read, as if dated on the day of the date of the codicil, but I am not at liberty to blot out any bequest contained in that will: and therefore it will stand as if, after the death of *Grace Parker*, she had given a legacy to her, her executors, and assigns. The authority of *Maybank v. Brooks*, (ante, vol. i. p. 84.) is precisely in point. There is no foundation to say, the executors were to take *eo nomine*. If there was any ground to say, that as *Grace Parker* was dead, it should be considered as a substitution of the executors, that was equally open in *Maybank v. Brooks*, but that case is decisive, that nothing went to the executor (a).

2. The husband claims as residuary legatee of the personal estate. In this case, it is perfectly clear, that this £1,000 cannot be considered as part of her personal estate. The authorities are very distinguishable from the present case. In *Mallabar v. Mallabar* and *Durour v. Motteux*, the two funds were blended together, and there was a general residue; not distinguishing, as here, between the residue of the real, and that of the personal estate: and it is apparent, that unless the Court had put the construction it did, that the words should carry the residue of both funds, the wills must have been totally avoided. These circumstances were strong and conclusive, to shew the intention of the testators: and where the intention of a testator is clear, it must be considered as part of the personal estate: but here, the intention is different: under the residue she did not mean to comprehend any part of the money to arise out of the real estate, therefore his claim must be rejected.

Then the question is, between the residuary legatees of the money arising from the sale of the real estate, and the heirs at law. In cases of this kind, some technical reasoning must be adduced. Supposing the intention not to be clear: in a doubtful case of construction, it should turn in favour of the heir at law. There seems to be no reason, originally, why the residuary legatees, in such cases should not take; but that the heir is favoured in cases of land, and uses springing out of land. The decision in most of the cases is, I believe, against the intention of the testator; but it is established as a rule, that there must be an apparent intent, upon

(a) Vide also *Bridge v. Abbot*, post, 224.

the face of the will, in order that the residuary legatee should take the whole. That is the ground of the cases cited at the bar. Here is no apparent intention against the heir; therefore the general rule must take place, that the money is considered as land; and if by subsequent accidents, and the party interested in it dies, so that it lapses, it will belong to the heir at law (a).

The next question is, who is the heir at law entitled to take; the heir *ex parte paternâ*, or *ex parte maternâ*. It is admitted the estate came to *Frances Weeks*, by descent from her mother; and the question is, whether the settlement upon her marriage, by giving the ultimate remainder to her right heirs, gave them a new estate as purchasers, or the old uses remain. I think it was the old use. Mr. *Simeon* has argued it upon different cases, as the case of a tenant in tail, with remainder to himself in fee, suffering a recovery, that a new use will arise to himself in fee: this is true, but it should be remembered, that if tenant in fee suffer a recovery, the old use remains. If I was inclined, in this case, to decide in favour of the heir *ex parte paternâ*, I must say she had put the estate out of her own power, in case she had survived her husband: but it is clearly otherwise; for it is expressly stipulated, that she should have the estate to her own use, and notwithstanding her coverture, should have a power to dispose of it: and it is expressly limited to her own right heirs for ever; so that the estate was left in her hands, to remain to her own use, as if there had been no settlement. Two cases had been cited, where the question was between the heir *ex parte paternâ*, and *ex parte maternâ*, where the person last seised had the equitable and legal estate; the Court held the legal to be the better estate, and that it absorbed the equitable; that therefore the estate must go in the line from whence it came. The case of *Balch v. Putt* does not apply; there the limitation was to the trustees and their heirs, to the use of them and their heirs, which took the legal estate out of the grantor. For the reasons given, the maternal heir will be entitled to the £1,000, subject to the life estate of the husband.

The next question relates to the £3,500 given to the plaintiff *Ann Jones*; and upon this several questions have arisen: 1st. Whether this sum could have been appropriated by the trustees, or the Court. 2dly. Whether it has been so appropriated. 3dly. Whether it can be now paid to the trustees under her marriage settlement. With respect to the first question; whether it can be appropriated; it is only necessary to go to the case of *Green v. Pigott*, (ante, vol. i. p. 104.) that case decides, that even on contingent interests, any person interested may come and have the fund appropriated; and it is convenient, and indeed necessary, that it should be so; and in cases where the interest of the fund has been given to A. and the principal, subject to that interest, divisible

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(a) Vide *Ackroyd v. Smithson*, ante, vol. i. 303. and the cases cited in the Editor's note.

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among several parties; upon the application of *A.* the Court has interfered. The question is, whether there are other rights affected by the appropriation; where that is not the case, it has been frequently done: I did it last week in the case of *Lady Cavendish*, and ordered the fund, of which she was entitled to the interest, to be paid to her son, she coming in and consenting. Then, if the Court would have appropriated the fund, the trustees are justified in doing it, without its intervention. The second question is, whether they have appropriated it. If the trustees are not decided in their opinion, they have a right to ask the opinion of the Court. In this case, the trustees have acted a fair and honourable part, to give every person interested, every advantage they could. They certainly have not thought the residuary legatees the persons principally interested; if they had, I should not have approved their conduct. The particular legatees are the principal objects of the testator's bounty, and therefore not to be sacrificed to the interest of the residuary legatees, who are more remote in his intention. The trustees did not choose to do it, without the opinion of the Court; but the tenor of their letters is, is that they *are ready to do it if they can*. They have made the appropriation; and by the letters and conduct, both of the father and daughter, it appears they have allowed and approved of it. The father, in one of his letters says, he will make it up a round sum, and that he is ready to take it at all risks. The trustees separated that sum, as a sum to pay the father and daughter the legacies. But let us see what could have been the intention of the parties. The sum to be laid out was £3,500, but that could not be done exactly; the broker added, thereupon, £17 more. Was it necessary the trustees should be exact? Clearly not, after the father had said he would make it up a round sum. Then with respect to the declaration of trust, it appears a declaration of trust was prepared; but Mr. *Hammond* thought it necessary to put Mr. *Hutcheson* to that expence. It does not admit of a doubt, that the sum was laid out for the payment of the legacies; and the only condition intended was, if the Court should approve; if it did, it should operate as an appropriation (*a*).

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The question therefore is, whether stock should now be transferred to the trustees of *Ann Jones's* marriage settlement, the father being entitled to the interest for his life. I have doubted more on this part of the case than the others. It was strongly pressed by Mr. *Mitford*, that the father could not give up his power of re-appointing, on the daughter's marrying during his life without consent. If any person is interested besides the father and daughter, I cannot order this sum to be transferred. I am clear the power cannot be released, Co. Lit. 265. *b.* Brownl.

(*a*) Upon the subject of appropriation of legacies, vide *Green v. Pigot*, ante, vol. i. 203. *Cooper v. Douglas*, ante, vol. ii. 231. *Sitwell v. Bernard*, 6 Ves.

543. *The Attorney-General v. Manners*, 1 Price, 411. *Hill v. Atkinson*, 2 Meriv. 45.

210. But if the condition is released, it should seem that the power is void. This depends upon the question, whether the condition is satisfied by *Ann Jones's* first marriage with the consent of her father. The words of the codicil are very strong. There are cases where conditions of this kind are considered as odious; and if this condition was extended beyond a first marriage, it might be attended with inconvenience; and I do not think it would fall within the original intention of this condition. The intention of these conditions is to prevent children from making inconsiderate engagements, they therefore do not extend to the case of a widow, or to a second marriage; and therefore the Court is warranted to say, the condition is complied with by the first marriage; that the legacy is vested, and the condition gone: consequently there is an end to the father's power, and nobody is now interested but the father and the daughter: and the case stands upon the same ground with that of *Lady Cavendish*, where the tenant for life agrees to give up the advantages of a sum of money for life, and consents to its being paid immediately to the person entitled to the principal (a).

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Decreed, therefore, that the £1,000 be paid to the heir *ex parte maternâ*, and the £3,500 to the surviving trustee in *Ann Jones's* settlement.

The cause came on to be re-heard before *Lord Chancellor*, 19th July, 1790, when Mr. *Mitford*, Mr. *Richards*, Mr. *Mansfield*, and Mr. *Simeon*, were again heard for their respective clients, and argued, to the same purpose as upon the former hearing; when *Lord Chancellor* gave a clear and decisive opinion against the claim of the heir *ex parte paternâ* to the £1,000.

Upon Mr. *Graham's* arguing again, on the part of the heir *ex parte maternâ*—

Lord Chancellor said, the question was, whether the testatrix's direction, that the money to be raised by the sale of the estate, should be laid out in the funds, was merely an arrangement to give the husband a life-estate in the interest, or she meant to give the residuary legatee an eventual chance, to depend on the rise or fall of stocks; if this latter was her intention, it would be impossible to maintain the decree.

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Mr. *Graham* then argued, that the former was her intention.

In this he was followed by Mr. *Solicitor-General*, who argued for the plaintiffs, and contended—that it appeared by the words of the will and codicil, that her intention was that the land should

(a) The whole doctrine upon the subject of conditions in restraint of marriage, is collected in *Scott v. Tyler*, ante, vol. ii. 431, and the Editor's note.

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be sold, and the money invested in the funds, merely for the purpose of the father's receiving the interest for his life; and then the money was to be disposed of in the manner directed by the will and codicil: that this was merely a mode of making a provision for the husband; and the effect afterwards was to be the same as if it had been to be paid immediately. With respect to the point of appropriation, he added to the cases formerly cited, one *Ex parte Champion* before Lord Northington, where a legacy being given to an infant, was laid out by the executors in 3 per cents. and the stocks afterwards falling, the infant was held to be bound; Lord Northington holding the trustee justified, because the Court, if applied to, would have made the same appropriation.

Lord Chancellor.—None of the cases have been attended with the same circumstance with the present; that the land is to be sold, the money invested in the funds, to the use of one for life, then the funds to be sold, and the money to be divided; by which it might happen, that the residue would be very great or very small, or even that the legatees must abate: I think the direction to lay out the money in the funds, was merely for the purpose of arrangement; and the rights of the parties were not intended to be affected by it. In order to say that they were to be affected, the testatrix must have foreseen the event, and have intended to give the residuary legatee a chance what would be the event of the funds; if so, I agree it would be impossible for the father to do more than to give up his own chance, and he could not enable the daughter to make an immediate claim. On the other side, it is said, she meant only to make an arrangement. It is material to consider it with a view to the original transaction. Suppose her intention was to give the residuary legatee a chance what might be the value of the stock in the event, the Court could not order it to be divided till the death of the tenant for life; but I think the better construction is, that it was merely for the purpose of an arrangement; in which case, if the father would release his interest, either to his daughter or the residuary legatee, it would give an immediate interest, and consequently there might be an appropriation.—Then the appropriation was made conditionally to abide the enquiry whether it could be made: I am inclined to think the appropriation could be made; and if so, it is made.—Having said nothing as to the disposal of the £1,000, the heir is not defeated; merely directing an appropriation of part, will not defeat the claim of the heir, will not defeat the heir as to what is not disposed of; though if a testator has blended his real with his personal fund, and has made a residuary legatee, it will carry all that is not disposed of. The question is, whether she has been explicit in treating of this as her personal estate; if so, the words will include it: but I take it, the testatrix meant the residue to be distributed in this manner; therefore the decree must be affirmed.

WEST

1790.

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S. C.

2 Cor, 258.

Lincoln's-Inn  
Hall, 20th July.

Legacy to the 7th,  
or youngest child  
of A. A. had six  
children at testa-  
tor's death, and  
had had another,  
who soon died.  
Afterwards the  
plaintiff was born,  
and was the 7th  
child living, but  
8th in order of  
birth; held he did  
not bear the de-  
scription; and de-  
creed in favour of  
youngest child.

## WEST v. THE LORD PRIMATE OF IRELAND.

**S**IR *Septimus Robinson* made his will in 1764, containing *inter alia* the following words, "I desire that my executor will, at his decease, bequeath 1,000 guineas to Lord *Cantalupe*, for the use of his 7th, or youngest child, in case he should not have a seventh child living."

Lord *Cantalupe*, at the death of the testator, had six children living. Another child had been born, but was dead. The plaintiff was the next child born after the death of the testator, and was baptised by the name of *Septimus*. Several children were born after. The plaintiff filed his bill, which, upon hearing, was dismissed. It came on now upon a petition for rehearing. In the mean while, Lady *Catherine* (a), the youngest child of Lord *Cantalupe*, filed a bill for the legacy.

Mr. *Solicitor-General*, Mr. *Mitford*, and Mr. *Campbell*, for the plaintiff *Septimus*.—The testator must be presumed to be cognisant of the state of Lord *Cantalupe*'s family, and that he had then six children, and therefore must have meant the next child, who should come into esse, to take the benefit of this legacy. He certainly meant a child that was to be born. The youngest child could not take, unless the seven died before the executor.

Mr. *Emlyn*, for the executor, referred to the case of *Lomax v. Holmden*, (1 Ves. 290.) in which it is held that a second son, becoming eldest, shall take under a limitation, in a settlement, to the first son; and the case of the duchy of *Cornwall*, there cited, where the eldest son living is held to be eldest son; and from thence argued that the plaintiff *Septimus*, when born, bore the description of seventh child.

But Lord *Chancellor* thought the plaintiff, being, in fact, the eighth child born, could not take by the description of seventh child, and decreed in favour of Lady *Catherine* as youngest child (b).

(a) Should be *Matilda*.(b) Vide *Del Mare v. Rebello*, post,

446. and the cases cited in the Editor's note.

1790.

Lincoln's-Inn  
Hall, 21st July.

A final decree  
cannot be made  
upon an interlocutory order,  
without consent.  
A specific performance decreed  
upon the ground  
of the evidence of  
a promise and  
part performance.

## ALLAN v. BOWER.

**T**HE plaintiff, having been some years a servant to the late *Robert Bower*, of *Welham*, com. *York*, Esq. and having been careful of and attentive to him during severe fits of the gout, *Mr. Bower*, in the year 1773, let to the plaintiff a farm at *Welham*, containing about 150 acres, at a rent of £60 a year, and at the same time lent him £200 in order to enable him to stock the farm, which sum was afterwards repaid. The farm, at the time, was much out of order from former ill treatment, and *Mr. Bower*, knowing that it would require time and expence to bring it into proper repair and improvement, agreed with the plaintiff for the assurance of the possession of the farm at the said rent of £60 a year, during his life, and undertook to do such acts and execute such instruments as should render the plaintiff secure in the possession of the farm during his life; and the plaintiff, in consideration of such premises, and with the privity of *Mr. Bower*, made very considerable alterations and improvements in the farm, in so much as to increase the value of the farm £30 a year.

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*Mr. Bower* died in *January* 1777, having first made his will, whereby he devised the greatest part of his estate, including the farm let to plaintiff, to his wife, for life, and, after her decease, to his nephew, the defendant, *Robert Bower*, son of the other defendant, *John Bower*, for life, with remainders over; and, shortly after his decease, there was found in his house, in an iron chest, among his deeds and writings relative to his estate, a paper writing, in the following words: "Whereas *William Pattison* and *John Allan* have been at very large expences in both their farms, which were greatly run out, and I know hurt them much in their circumstances, I desire they may not be raised in their rents on any account, as I have promised this order should be given by me, as not willing to grant them leases, which was reasonable for me to do, as I know full well the rent would not be paid for some years, the farms being so much out of order. I hope this will be duly observed by those in possession of my estates, as witness my hand this 10th day of *October*, 1775. *Robert Bower*." The widow entered upon the estate, and continued in possession till her death, in 1786, and, during that time, suffered the plaintiff to occupy the farm at the same rent; but, after the death of the widow, the defendant, *John Bower*, as guardian to his son, *Robert Bower*, the tenant for life, an infant, served the plaintiff with a notice to quit, dated 21st *March*, 1786; and afterwards, on the 2d *June*, caused the plaintiff to be served with a declaration in ejectment: upon which the plaintiff filed his bill, praying a specific performance of the agreement with the late *Robert Bower*, and that the present defendants might, by the proper mode, assure to plaintiff the continuation

tinuation of the possession of the farm, at the yearly rent of £60, during the joint lives of defendant, *Robert Bower*, and plaintiff; and an injunction to restrain defendants from proceeding in the ejectment, and taking other means to turn plaintiff out of possession of the farm.

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To this bill the defendants put in their answer, admitting the improvements in the farm, and also admitting the paper writing; but submitted that the paper was, in its nature, testamentary, and affecting to dispose of interests in real property, and not being duly attested, could have no operation; that the plaintiff, having enjoyed the farm till the death of the widow (being upwards of ten years) at the rate of £60 a-year, had received the full benefit intended him; and that it was evident, from the expressions used by the testator in the paper, viz. that "he was not willing to grant leases," that he did not intend the plaintiff a longer enjoyment of the farm at the rent of £60. They stated also, that the ejectment had been tried, and a verdict found for defendant, *Bower*.

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Upon motion to dissolve the injunction, it was referred to the Master to enquire into the annual value of the farm at the plaintiff's first entering thereon as tenant, and the present annual value; and what term of years was intended to be granted by the paper writing; and in case he should find that term to be expired, what additional rent ought to be paid, from the time of the recovery of the judgment in ejectment, over and above the £60.

On a commission, the plaintiff examined witnesses, to prove declarations of the testator, that he meant, by the paper writing, to secure to the plaintiff his farm during his life, on payment of his old rent.

The Master made his report, dated 12th *March*, 1788, and thereby stated, that the value of the farm, at the time plaintiff took possession of it, was of the annual value of £60. With regard to the paper, he did not think himself at liberty to receive oral testimony to explain it, but was of opinion, that no term of years was meant to be granted by the testator, and that, by his not granting any lease himself, it was his intention to leave his representative at liberty to remove the plaintiff: but that, whilst he should be permitted to occupy the premises, the rent should not be raised upon him; or, if any term was intended, it was only a term of three years; and he found that the value of the premises had been for several years £100, and therefore an additional rent of £50 ought to be paid, from the time of the judgment in ejectment.

To this report exceptions were taken by plaintiff: 1st. to the Master's having declined to receive oral testimony, to expound the meaning of the paper writing: 2d. To his having reported that no term was intended; and, 3dly, that if any term was intended, it was a term of three years only.

Upon

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Upon the exceptions coming on to be argued, 4th *July*, 1788, *Lord Chancellor* ordered that it should be referred back to the Master to review his report, and to enquire and state what the promise was that is mentioned in the instrument, dated 10th *October*, 1775, and at what time the promise was made, and what interest the tenant was to acquire in the premises under such promise; and the Master was to be at liberty to state specially any particular circumstances that might arise on such enquiries, and the parties were to be examined on interrogatories.

In consequence of this order, another commission for the examination of witnesses issued, and witnesses were examined, who, as they had done before, gave oral evidence of testator's declarations, that he intended plaintiff should enjoy the farm for his life.

On the 30th *June*, 1789, the Master certified, that if parol evidence of a lease for life could be admitted, or could substantiate for more than three years, notwithstanding the statute 29 *Car.* 2. any mention of a promise of a lease, in which written mention of such promise, no certain estate, interest, term of the lease so promised, was specified or given to be understood, the Master was of opinion, after receiving the parol evidence therein before recited, that the terms of the promise, referred to in the instrument dated 10th *October*, 1775, could not be now ascertained, nor the time of the promise being made; but from the said parol evidence it was to be collected, the interest which the tenant was to acquire in the premises, under such promise, was to have been an interest for life, upon payment of a rent of £60 a-year for the same; and that, on the contrary, if the said parol evidence be not decreed admissible within the statute, and be therefore laid out of the case, the Master remained of the opinion certified by his former report.

The cause came on for further directions 25th *July*, 1789, when *Lord Chancellor* was pleased to declare, that the agreement ought to be specifically performed and carried into execution, and decreed accordingly; and that it should be referred to the Master to settle a lease from the defendants to the plaintiff, for the term of 99 years, determinable on the life of plaintiff, with proper covenants, and that the defendants should execute the same, and the plaintiff execute a counterpart thereof.

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The defendants presented a petition, stating, that the defendant *John Bower* had no interest in the premises, and defendant *Robert Bower* was an infant, and tenant for life only of the said farm, and no person having the inheritance brought before the Court, nor any day given to defendant, *Robert Bower*, to shew cause against the said decree, and therefore praying that the cause might be reheard.

In fact, the defendant, *Robert Bower*, though an infant during the former proceedings, became of age a short time before the decree.

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The cause came on now to be re-heard.

Mr. *Solicitor-General*, for the plaintiff, stated the proceedings on the record to be as has already been stated, and that the decree proceeded on the ground, that the paper writing of the 10th of October, 1775, amounted to a confession of a parol agreement, and that the repair of the estate was the consequence of that agreement, which, it was in evidence, was for a lease for the life of the plaintiff, whom his Lordship had determined to be entitled to relief, and therefore had made the decree.

Lord Chancellor spoke to the following effect:—In this case, a decree has been made for specific performance, on the ground of the evidence of the promise, and upon a part-performance by the plaintiff. It seems to me, that such a promise will sustain a specific performance, and therefore, as I could not determine, on the injunction, that he had no right to a specific performance, I think the order right; but I have great doubt as to the propriety of the decree.

My doubt is, as to the matter of form; and, in that respect, I do not know how the decree is to be supported.

It seems to be the rule, that the parties should go to commission; and that a decree cannot be made upon an interlocutory order, without consent.

The order must be, to set aside the decretal order, and leave the case in *statu quo* (a).

(a) Lord Redesdale, in observing upon this case in *Clinan v. Cooke*, 1 Sch. & Lef. 37. after noticing the necessity of setting aside the decree as being irregularly made, expressed himself as follows: "I know it never came on again. Whether the decision would have been the same if it had, I cannot venture to say, but that must at all events have depended on its being, or not being, considered a part execution of a parol agreement; for Lord Thurlow thought, that the paper left behind by Bower, shewed that he had come to some parol agreement, and having done so, had let the plaintiff into possession; that the plaintiff had laid out great sums of money on the farm. This he considered as proved by that paper, which he considered as a confession by Bower of that fact; and this he thought sufficient ground for directing an enquiry what was the agreement entered into, to which that paper referred. That is, he considered that paper, not as an agreement to be supplied by parol evidence;

but as evidence of a parol agreement. There were very great doubts whether that was a solid opinion, though Lord Thurlow took it up very strongly, and his decisions were very seldom unsatisfactory. Any person who reads his decision in 3 Bro. will find that he did not feel himself very strong when he delivered his opinion. There was something of the same impression as was on his mind in the case of *Tawney v. Crouther*. In the first of those cases, where a man said he would not sign a paper, Lord Thurlow considered this tantamount to a signature; and in the latter, when the expressions of the party were, that he had not given his tenant a lease because he was not willing to grant a lease, his Lordship held this as an agreement to grant a lease. I confess my mind could never follow these two cases, and there was great doubt amongst the bar on both of them." The cases upon this subject are collected in a note to *Tawney v. Crouther*, post, 318.

1790.

ALLAN
v.
BOWER.

RONDEAU

1790.

Lincoln's-Inn
Hall, 21st July.
Plea of the *stat.*
of *frauds*, to an
executory con-
tract, over-ruled.

RONDEAU v. WYATT.

THIS was a bill filed, relative to a contract for corn. It stated that the plaintiff, on the 3d July, proposed to the defendant to purchase of him, and his partners) the proprietors of the *Albion Mill* (6,000 sacks of flour, at 4*ls.* per sack; that the defendant then said he could not give him an answer, but afterwards, having consulted his partners, met the plaintiff, and said he could not let him have 6000 sacks, but that he should have 3000, which should be shipped on board vessels in the river *Thames*, and proposed to have the agreement reduced into writing;—that some clerk of the defendant's made some entry of the agreement in the defendant's books; that the plaintiff, on the 8th July, sent 1000 sacks for part of the flour, and the defendant, or his servants, put the flour on board of barges, in order to its delivery; but the defendant (on the rise of the value of flour) ordered the boats to be unloaded, and refused to deliver the same. The bill prayed a discovery of the facts, and names of the partners in the undertaking, in order to found an action at law.

To this bill the defendant pleaded the statute 29 *Car. 2.* of frauds and perjuries; and, by averment, negatived the exceptions in the statute; and the plea was supported by an answer.

The plea had been argued before, 16th June, 1789, and was then over-ruled, because the matter was wholly at law. *Lord Chancellor* said, it was not like the case of land, where the plaintiff may amend his bill, and pray a specific performance, which cannot be as to the delivery of goods.

The plea was, however, by consent, set down to be argued again.

Mr. *Solicitor-General*, Mr. *Mitford*, and Mr. *Alexander*, now argued, that this was a good plea. Even taking the bill to be proved, as to those circumstances which are denied, the defendant is protected from a discovery of matter which, if discovered, would be nugatory.—In this case the bill prays no equitable relief, therefore it is reduced to this, that it prays the confession of an agreement, upon which no remedy can be had.—The contract itself, being for the sale of goods, is void, unless it is attended by the solemnities required by the statute. In the case of *Towers v. Osborn*, 1 *Str.* 506. it was a contract out of the range of the statute, as being future: here the contract is within the statute, as it is a contract to be performed immediately. In *Debigge v. Lord Howe*, 1782, Colonel *Debigge* filed a bill against Lord *Howe*, stating, that he had done services for government, and that Lord *Howe* had contracted to pay him; and praying a discovery, in order to found an action at law. Lord *Howe* demurred, and the demurrer was allowed, because the Court was of opinion the case would

would not support the action.—The cases of *Baker v. Pritchard*, 2 Atk. 387. *Dinely v. Dinely*, ib. 394. and 2 Ves. 396. shew that a court of equity will not suffer a person to come here for discovery of that which is not material to some suit, either at law or in equity.

1790.

RONDEAU
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Mr. *Hollist*, for the plaintiff.—It is assumed here, that there is no cause of action. If that point is doubtful, the plea ought to be over-ruled. I take the case to be out of the statute, which has not been held to extend to executory contracts. *Towers v. Osborn*, Str. 506. *Clayton v. Andrews*, 4 Burr. 2101. *Simon v. Melivier*, Buller's Nisi Prius, 280. This contract is executory. The agreement made the 3d July is for flour, to be put on board the plaintiff's ship, if the plaintiff could obtain leave to export. On the 8th July, he obtained leave. The bill then states, that the defendant put the corn on board lighters, to be carried on board the ship. The contract is executory in that respect; but it is further so: for it is, that if the plaintiff could not obtain leave to send it from London, he could sell it at Liverpool, and the order to put the corn on board was not countermanded till the 10th.

Lord Chancellor.—If, upon the face of the bill, it appears that there can be no remedy, you shall not have a discovery, which is merely impertinent. I should have thought that the mere fact of the corn not being to be delivered immediately, would not have taken it out of the statute. Here the plaintiff was to send his own sacks to be filled, and to be sent on board the ship. This way of taking it out of the statute is what one would not determine in a new case. I therefore do not go upon its being out of the statute; but if it is a measuring cast, and upon cases at law which must stand till they are revised by a court of law, it is held to be out of the statute. I cannot, sitting in a court of equity, say that the cases are improperly settled at law (a). I should think the putting the corn in the barges a delivery.

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Plea over-ruled.

(a) The doctrine upon this subject was afterwards fully reconsidered. An action was brought by the plaintiff in the Court of Common Pleas, in which he obtained a verdict contrary to the opinion of Lord Loughborough, who thought, that on grounds of public policy, but chiefly because the contract seemed to him to be within the statute, the plaintiff was not entitled to recover. Upon a rule to shew

cause why the verdict should not be set aside, and a nonsuit entered, his Lordship, in delivering the opinion of the Court, satisfactorily shewed, that the provisions of the statute extended to executory contracts. *Rondeau v. Wyatt*, 2 H. Bl. 68. And this decision was afterwards confirmed by the opinion of the Court of K. B. in *Cooper v. Elston*, 7 T. R. 14.

1790.



S. C.

2 Cox, 263.

Lincoln's-Inn
Hall, 21st July.A deed obtained
by fraud, is not a
revocation of a
prior will.

HAWES v. WYATT.

FRANCIS HAWES (a common sailor) being seised of the remainder in fee of an estate near *Marlow*, com' *Bucks*, subject to the life estate of his father, made his will, duly attested, 2d July, 1785, and thereby gave this estate in reversion to the plaintiff, in trust for his mother, during her natural life, remainder to the plaintiff in fee, subject to payment of £100 as therein appointed.

The testator having been much distressed, and being at the time absolutely dependant on his father *William Hawes*, who had the life estate in the premises; the latter, about the time of the making of the will, formed a scheme of getting from the son the remainder in fee in the estate; and obtained deeds to be prepared, by which the son should convey the remainder to the father, in consideration of a nominal debt. Indentures of lease and release were accordingly prepared, bearing date in the month of *July* 1785, between the son of the first part, and the father of the second part; reciting, that the son was indebted to the father in the sum of £1,000, and had agreed, in satisfaction thereof, to convey his remainder in fee, by which it was witnessed, that in pursuance thereof he conveyed his said remainder to the father, his heirs and assigns for ever: and the father prevailed upon the son, by threats and promises, to execute the same, although no such debt was really due.

The son, after executing the deeds, expressed great disapprobation and concern at having been constrained so to do; and being in debt, and the father having refused to support him, was compelled to go to sea; which he did on board an *East India* ship, and died *October* 1786, in *China*.

The father having obtained the conveyance, made his will 30th of *March*, 1786, and thereby devised the estate to trustees, to the use of his wife for life; remainder to the son for life; remainder to his issue; remainder to the defendants; and died about *April*, 1787.

The bill prayed that the conveyance to the father might be set aside, as having been obtained by fraud, imposition, and duress, and might be delivered up to the plaintiff, or, in case it should appear that *Francis* the son was indebted to the father, at the time of the execution thereof, in any sum of money, that the conveyance might stand as a security for such sum; and, upon the payment thereof, the infant defendants might, when they should attain 21, re-convey the same; and plaintiff, in the mean time, might hold and enjoy the premises.

The plaintiff examined witnesses, who completely proved his case, that the deed was fraudulently obtained, without any preceding debt, or reason for the same.

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The defendants produced, at the hearing, a common seaman's will (of a subsequent date) in the father's favour; the signature to which they proved to be of the testator's hand writing.

The cause was several days in hearing at the Rolls; and at length his Honour gave judgement; when he expressed himself satisfied that the deeds were fraudulently obtained; but being of opinion that they operated as a revocation of the will, he dismissed the plaintiff's bill (a).

The plaintiff afterwards appealed to the *Lord Chancellor*, on the ground that he ought to have had relief, or the question, whether the deeds operated as a revocation, should have been put in a course of legal enquiry.

The appeal came on now to be heard before *Lord Chancellor*.

Mr. Mansfield, *Mr. Graham*, and *Mr. Hollist*, for the plaintiff.—It is not necessary now to use any argument as to the validity of the deed; it may be taken for granted, that that point is given up; the only question now is, whether it can have the effect of revoking the will.—It was agitated below whether the deed was not void at law; and if so, whether at law it could be a revocation: but the cases at law are too strong to shew that ineffective conveyances may operate as revocations. *Dister v. Dister*, 3 Lev. 108.

But though not void, and supposing it would be a revocation there, it is not so in equity. The cases at law, which it is most similar to, are those where deeds are obtained by duress or *per minas*; and those circumstances will avoid, even at law, deeds clearly executed and known to the parties: upon this principle the deed is void, the fraud vitiates it; being done under the eye of the father, and the abuse of parental authority, is a sufficient ground for setting aside deeds, *Glissen v. Ogden*, cited 2 Atk. 258. and the insertion of a consideration, makes it so much the worse: a deed which must be avoided at law cannot operate as a revocation.

But supposing a debt had really been proved, the Court could only have held the conveyance to be a security: and a mortgage, though in fee, is no revocation, *Vernon v. Jones* (z), Pre. Ch. 32. 2 Vern. 241. there, though there was a trust to sell for payment of debts, the mortgage was held only a revocation *pro tanto*.

All the cases of implied revocations are before the statute of frauds, and are very much shaken by the case of *Parsons v. Freeman*, 3 Atk. 741. In that case, *Lord Hardwicke* rested its being a revocation upon new uses being declared; he lays it down, that the recovery without declaring new uses would be no revocation;

(z) See also *Blake v. Johnson*, *ibid.* 142.

(a) There is a full report of *Lord Mansfield's* very luminous judgment in *Mr. Cox's* report of the case.

1790.
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 HAWES  
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he says, "the construction must arise from a presumed intention, " that the testator would not have made a new conveyance without an intention to revoke his will;" apply this doctrine to the present case, and there could not be an intention here to revoke the will. He did not mean to do an act by which he should be bound.

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Lord Mansfield, in *Wright*, on the demise of *Clymer v. Littler*, 8 Bur. 1256. thought that a fraudulent deed could not operate as a revocation.

Here the plaintiff only prays, that the deeds may be delivered up, he does not pray a re-conveyance.

The subsequent will is not proved; if it had, it would have been shewn to have been procured in the same way with the deed.

Mr. Solicitor-General for the defendants.—The present question is only, whether the devisees under the prior will can say they are entitled, though the maker of the will made this conveyance, and never shewed any inclination to undo it, and died with the intention that the conveyance should have its effect. If the party himself did not impeach the transaction, the devisee cannot set up the will against it. There is no case where relief has been given under such circumstances. There are many cases where devisees have been relieved, but they are all of devises subsequent to the act which is set aside. If this was the case of an heir at law, he could not be relieved where the party conveying lived a year and half, and more, and never sought a remedy against the conveyance. That the father, in this case, did not mean to rob the son is clear. It is in evidence that the son was extravagant; the father wished to secure this reversion from the effects of his extravagance: the giving the son a life estate in the premises shews he meant only to settle the estate. The son certainly never impeached the transaction, which was of such a nature that he might have affirmed it; or, having only an equity remaining, he might have released it by parol. In the present case the intention of the party, when he executed the conveyance, was, that the will should not subsist. But it is said to be only a mortgage; and that if so, it is only a revocation *pro tanto*. But, on the contrary, it is an absolute conveyance, without the least pretence to say it is a security.

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It is difficult to say, that where the testator, at the time of the execution of the deed, intended that the devisee should not have any claim, that intent shall not prevail, because it was shewn by an act obtained by undue means. The equitable estate which he obtained in consequence of the fraud, was a new estate, different from that which he had at the making of the will; and there is nothing to shew that he meant to make the same disposition that he had made before; on the contrary, by the subsequent will, he has shewn his father was the object of his bounty. If this is not a revocation,



a revocation, what will be sufficient to shew that the former devisee is not to take?

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HAWES

v.  
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*Lord Chancellor.*—The remedy prayed is, that the deed shall be given up. If I give it up, I treat it as a mortgage merely in order to do justice, if there is any demand; and if not, and I deliver up the deed, shall I still say that it is a revocation? Whoever orders the deed to be delivered up, declares it to be no deed. If the party had come himself, must he not have had the deed delivered up? The act might have been in evidence, to shew that the testator approved the transaction: as it is they have only proved the hand-writing; and the instrument has no effect. If no money is shewn to be really due, the deed must be delivered up.

*Decree of dismissal reversed (a).*

Vide *Hick v. Mors*, Amb. 215. *Gibbons v. Beden*, 27th June, 1779. Brown's Equity Cases Ab. quarto.

(a) It was unfortunate that the case of *Hick v. Mors*, Amb. 215. was neither cited at the Rolls, nor on the hearing of the appeal, as the two cases as they now stand are in direct contradiction. In *Hick v. Mors*, a son was induced by his father to execute a deed, which Lord Hardwicke held to be a revocation; as the son intended that the will should not operate, Lord Almonley on two occasions afterwards alluded to the contradiction between these cases, and fortified by the authority of Lord Hardwicke, appeared to retain the same opinion, that he had done at the hearing of the cause, *Harwood v. Oglander*, 6 Ves. 215. *Ex parte The Earl of Ilchester*, 7 Ves. 374. observing, that it would have been different in *Hick v. Mors*, if it had been such a fraud as to make him execute one deed, when he thought he was executing another. So in the case of *The Attorney-General v. Vigor*, 8

Ves. 283, Lord Eldon observed, "till the case of *Hawes v. Wyatt*, I conceived there was a great difference between a deed void at law for covin and a deed, which in this Court could be set aside for fraud, either by cancelling it or by directing a re-conveyance, upon the ground, that at law it was not a nullity, nor admitting the plea of *non est factum*; but, that upon equitable circumstances, constituting a fraud in this Court, the legal effect of it is reduced; and this Court says, it shall not prevail, by directing an act to be done to reinstate the other party. If *Hawes v. Wyatt* is right, it contradicts *Hick v. Mors*, to a very considerable extent; and must be supported upon this principle, if any, that where a man is induced by fraud, this Court considers him as having no will. He is compelled by fraud as much as a partition is compelled by the writ."

PITT v. LORD CAMELFORD.

THIS was a branch of the case of *Pitt v. Jackson*, reported vol. ii. p. 51.

*Pinkney Williamson*, by a codicil to his will, bearing date the 25th December, 1781, reciting that he was possessed of about £7,000 navy bills, gave the same to his executors to receive the interest, and to lay the same out in the funds, to such uses as his daughter

Lincoln's-Inn  
Hall, 21st July,

Testator, reciting that he is possessed of a certain sum in navy-bills, bequeaths it. This is a specific legacy, and shall pass only such navy bills as he possessed at his death.

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v.  
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CAMELFORD.

daughter *Ann Pitt* should appoint. At the time of making the codicil he had £7,029 navy bills; he afterwards purchased other navy bills, and also victualling bills, and sold others. At the time of his decease he was possessed of only £4,300 navy bills, though he was possessed of various victualling bills. It had been referred to the Master to enquire what was intended to pass.

The Master reported the particular sums which the testator possessed in navy and victualling bills, at the time of the codicil made, and of his death; and further, that navy and victualling bills were considered as synonymous by the brokers, and persons concerned in buying and selling them, as bearing the same price.

It came on now upon the Master's report.

Mr. *Attorney-General* argued that this was a specific legacy, and could only pass navy bills strictly so called, and those only which he possessed at his death; although these two sorts of bills are of a similar nature; as testator giving one species of property, cannot be intended to mean another to pass.

Mr. *Mansfield* and Mr. *Graham* for the legatee, contended she was entitled to all the bills. This is a fluctuating property, and the bills so much of the same nature, that a broker who is instructed to buy one sort, thinks he has executed his commission by buying the other. They are considered as completely synonymous. According to the true construction, it is not a specific legacy, but is rather a description of the money than of the fund.

Lord *Chancellor* said, if ever there was a specific legacy, this was so: if they had continued, and other legacies had exhausted the personal estate, these could not have abated.

He therefore decreed the funds purchased with the navy bills, of which testator was possessed at his decease, to pass (a).

(a) The cases upon the difference between specific and pecuniary legacies, are collected in a note to *Antburner v. Macguire*, ante, vol. ii. 168.



Lincoln's-Inn  
Hall, 23d July.

TAWNEY, Knt. v. CROWTHER and Another.

Defendant having acknowledged, by letter, an agreement for sale of an estate, takes it out of the statute of frauds.

DEFENDANT *Crowther*, being seised of an house called the *White Hart Inn*, in *Benson*, com. *Oxford*, which he was desirous of selling, the plaintiff employed the other defendant *Morrell*, an attorney at *Oxford*, to treat for the purchase; who agreed to give, and *Crowther* to take £1,100, and it was agreed between them that the agreement should be reduced into writing in order to be signed: it was accordingly reduced into writing; but *Crowther* wishing to receive the rent due at *Michaelmas*, pos-  
session

session was not to be delivered till then; but the defendant declared that his word was as good as his bond, and that he should be in *Oxford* on the *Tuesday* morning, and would then call on defendant *Morrell* and sign the agreement: defendant *Crowther* not coming on the *Tuesday* morning to *Oxford*, defendant *Morrell* wrote a letter to him saying, that "though he had no doubt *Crowther's* word would be, as he had declared, as good as his bond; yet as life was uncertain, he wished the agreement to be signed." In answer to this defendant *Crowther* wrote a letter, in which he stated his having been from home, and acknowledged he said his word should be as good as a bond, and that there was time enough sufficient from thence till *Michaelmas* to settle every thing; and again repeated once more, that his word should always be as good as any security he could give. This letter was afterwards stamped.

Defendant *Crowther* afterwards refusing to complete the agreement, plaintiff filed his bill for a specific performance.

To this bill the defendant pleaded the statute of frauds; averring that there was no contract in writing.

But *Lord Chancellor* thinking the letter sufficient to prevent the operation of the statute,

*Over-ruled the Plea (a).*

(a) An answer was afterwards put in for the proceedings, on which vide post, 318, where the subsequent cases are collected in the Editor's note.

### LOWTHIAN v. HASEL (b).

UPON further directions the only question was, whether Mr. *Garforth*, a creditor of *Andrew Whelpdale*, deceased, by mortgage, who also was a bond creditor for £1,134. 3s. should tack his bond debt to his mortgage against other specialty creditors.

Lincoln's-Inn  
Hall, 23d July.

Mortgagee, having also a bond, cannot tack it against other specialty creditors, though he may against the heir.

Mr. *Solicitor-General*, Mr. *Lloyd*, and Mr. *Alexander*, insisted, on the part of the general creditors, that there was no case where this had been permitted against other bond creditors, though it was allowed against the heir of the debtor; and for this they cited the Anonymous case, 2 Ves. 662; and Mr. *Alexander* said, it appeared by the Register's book that the same was determined in *Hartwell v. Chitters*, which is reported Amb. 308.

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Mr. *Graham*, for Mr. *Garforth*, said, that 2 Ves. 662. did not apply to the present case; that there other creditors meant creditors of an higher nature, or creditors under the trust-deed. In *Powis v. Corbet*, 3 Atk. 556, Lord *Hardwicke* confines it to the

(b) See another point in this cause, reported post, vol. iv. 167.

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LOWTHIAN  
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case of creditors of a superior nature; but from the nature of the thing, creditors, whose debts are of the same nature, are within the rule. If the heir is precluded from redeeming, without paying the bond debts, the mortgagee must certainly be preferred to other creditors; *Coleman v. Winch*, 1 P.W. 775. *Troughton v. Troughton*, 3 Atk. 656.

Lord Chancellor said, the only reason why the mortgagee can tack his bond to his mortgage is, to prevent a circuitry of suits: it is solely matter of arrangement for that purpose, for in natural justice the right has no foundation. The principle explains the rule; and therefore it can go no further: the creditor having another specific security, cannot give him, in justice, any priority. There being no foundation in justice, the only question is, whether the Court is in the practice of doing it; and it has not done it in any case but that of the heir, and merely to prevent circuitry (a).

(a) This point is so clearly settled, that in *Hamerton v. Rogers*, 1 Ves. jun. 513. it was given up, upon the authority of the present cases. For the cases upon the general doctrine of

tacking securities, vide Mr. Cox's note to *Bruce v. Duchess of Marlborough*, 2 P.W. 491. Mr. Nolan's note to *Hagshaw v. Yates*, 1 Stra. 240. and the Editor's to *Belchier v. Butler*, 1 Eden, 523.

Lincoln's-Inn  
Hall, 4th July,

PRICE v. WILLIAMS.

Exceptions will not lie to an award, but the same topics may be a ground for a motion to set it aside.

## EXCEPTIONS to an award.

Mr. Attorney-General moved to discharge the order, on the ground that the award was final, being made by persons appointed judges by the parties themselves.

Mr. Solicitor-General, for the exceptant, cited the cases of *Cresly v. Carrington*, 1 Vern. 469. and *Hide v. Cooth*, 2 Vern. 109. that exceptions may be taken to an award.

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Lord Chancellor said, if it remained open to exceptions, it seemed to be rather a reference than an award; that it was intended, in the present case, that the whole matter should be referred, in exclusion of the Court, except as to the costs; and that he did not at all agree with the cases in Vernon. The proper way would be to move to set aside the award; and the topics in the exceptions would apply to such a motion, a mistake in the arbitrator being a ground to set aside an award (a).

(a) For the general doctrine upon this subject, vide *Dick v. Milligan*, post, vol. iv. 117. and the cases cited in the note to it.

SITTINGS

1790.

SITTINGS BEFORE

## MICHAELMAS TERM.

31 GEO. III. 1790.

## ATTORNEY-GENERAL v. CHRIST'S HOSPITAL.

**A**N estate being devised to *Christ's Hospital*, on condition of maintaining six children from the parish of *St. Leonard, Shore-ditch*, and the hospital having taken possession; the rents at first proved insufficient to maintain the number, and the hospital had maintained only three, and an account having been exhibited to the governors, the latter had been satisfied. But, upon filing the information, it was found that there had been a mistake in the account, and the rents had not been expended, and it appeared the rents were now sufficient to maintain the whole number.

Where an estate is given upon condition, the taking the possession binds to the performance of the condition, though there be a loss.

*Lord Chancellor* thought, whether the rents were or were not sufficient to maintain the number, the hospital having taken possession of the estate, was bound to perform the condition, and that they should have considered of that previous to taking possession (a).

(a) So in the case of *Lord Ewre v. Strickland*, Cro. Jac. 240. it was resolved, that where one takes by the Queen's patent, he consents to all things therein; and therefore where it contained a clause for repairing and

leaving in repair, the Court held that those words were, as if they were spoken by the lessee. The same point was determined in *Brett v. Cumberland*, ib. 522.

## MICHAELMAS TERM.

[ 166 ]

31 GEO. III. 1790.

## ATTORNEY-GENERAL v. OGLANDER.

**L**ORD CHANCELLOR said, that although where a charity is so given, that there can be no objects of it, the Court will order a different scheme to be laid before it; yet if the objects may exist, though they do not at present (as widows, though no widows are at present among the number) it will not (a).

When a charity is so given, that there can be no objects, the Court will order a different scheme, but not so because objects do not at present, but may exist.

(a) So in the case of *The Attorney-General v. The Bishop of Chester*, ante, vol. 1. 444. the money was retained in Court till it could be seen whether a

proper appointment could take place. As to the application of the *cy-pres* doctrine to charities, vide *Moggridge v. Thackwell*, post, 517.

L 2

LUCAS

1790.

S. C.

1 Ves. jun. 235.

The defendant having taken a deposit of a lease, as a collateral security, decreed to take an assignment.

## LUCAS v. COMMERFORD.

[ 167 ]

IN September 1773, *Francis Atkinson* demised to *Richard Stapleton* certain premises, containing four messuages, &c. in *Lambeth, Com. Surry*, for the term of seventy-one years, under the reserved rent of £14. 14s. for the first ten years, of a pepper-corn for the eleventh year of the term, and of £12. 12s. for the remaining sixty years of the term; and there was a covenant in the lease, that *Stapleton*, his executors, administrators, or assigns, should, in the eleventh year of the lease, pull down and substantially rebuild the four houses situate on the premises. The defendant having afterwards, 28th *March*, 1776, lent to *Stapleton* the sum of £100, the latter gave him his bond for £200, with a condition for payment of the money, and a covenant, that the premises comprised in the lease should be subject to the payment of such sums. The lease was accordingly deposited with the defendant, but no assignment of it was ever executed. And, in 1782, *Atkinson* conveyed the premises, subject to the lease, to the plaintiff: and was since dead insolvent. The defendant took, and continued in possession. About the 4th of *July*, 1785 (the year when, according to the covenant, the lessee was to rebuild), the plaintiff's agent accepted from the defendant *Commerford* £14. 14s. as the rent due for that year; but, upon settling his accounts with the plaintiff, the mistake was discovered, and application was made to the defendant to rebuild, which he refused, on which the present bill was filed for a specific performance of the covenant contained in his lease.

The defendant, by his answer, stated the fact of the deposit by way of mortgage, as above, and insisted, that *having no title* but as mortgagee, he was not bound to rebuild.

The other defendants, who were the representatives of *Stapleton*, stated his insolvency and death.

*Mr. Mitford*, for the plaintiff, contended, that in this case a specific performance ought to be decreed, and for this purpose cited *The City of London v. Nash*, 1 Ves. 12. more fully reported 3 Atk. 512. where *Lord Hardwicke* laid it down that, upon a covenant to rebuild, the landlord may come here for a specific performance, as the not building takes away his security.

*Mr. Mansfield*, for the defendant *Commerford*, said,—That the defendant having come into possession of this lease *merely as a deposit*, it would be very hard he should be obliged to encrease his loan by rebuilding, especially as the representatives of *Stapleton* might pay him off, and retake possession.

*Lord Chancellor* thought *there could not be a decree to rebuild*, as he could no more undertake the conduct of a rebuilding than



than of a repair (a), and that the defendant could not take the estate as a security, without taking the burthen that was upon it, which having once taken, he could not abandon. That being at present only an assignee in equity, no action could be brought, and that the only relief he could give the plaintiff, as he could not give him damages, was to put him in a situation to recover them. He therefore decreed, that the defendants should take an assignment of the lease, and execute a counterpart, and that he must pay the costs.

(a) In two instances, indeed, specific performance has been decreed of a covenant to rebuild. *City of London v. Nash*, 3 Atk. 515. S. C. 1 Ves. 12. *Allen v. Harding*, 2 Eq. Ab. 17. and in *Moseley v. Virgin*, 3 Ves. 184, Lord Rosslyn was of opinion, that if the transaction and agreement were in their nature sufficiently defined, there might not be much difficulty in decreeing a specific performance. Lord Kenyon,

however, in *Errington v. Dynesly*, vol. ii. 313. appears to have been of the same opinion as Lord Thurlow, that a specific performance could not be decreed: that a covenant to repair cannot be specifically carried into effect, vide *Rayner v. Stone*, 2 Eden, 128. and the Editor's note to it; and upon this subject and doctrine connected with it, vide the reporter's note to the case of *Wright v. Bell*, 1 Daniel, 101.

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LUCAS

COMMERFORD.

### HARE v. SHEARWOOD and Others.

**B**ILL to redeem an annuity under the following circumstances: In July 1780, plaintiff (being of the age of twenty-six) having occasion for £300, applied to Mr. Harborne, his solicitor, to procure him the same, and he applied to William Haynes, esq. deceased, who agreed to advance the £300 to plaintiff, for the purchase of an annuity of £50 for the life of plaintiff, to be secured by the joint bond of plaintiff and his father, and power of attorney to Haynes, to receive the £50 out of £200 which the father paid annually to plaintiff. Mr. Harborne informed the plaintiff, that it was agreed between him, on the part of the plaintiff, and Mr. Haynes, that the plaintiff should be at liberty to pay off the annuity at any time, on giving fourteen days previous notice, and paying the £300 and the arrears to the time; accordingly the plaintiffs, the father and son executed a joint bond, and the plaintiff, the son, a warrant of attorney, to enter up judgment thereon, and also a power of attorney to Haynes to receive the £50 arising out of such his allowance. In 1784 the plaintiff Francis, the son, being in expectation of receiving a sum of money which would have enabled him to re-purchase the annuity, requested Mr. Harborne to give Mr. Haynes notice of his intention of so doing, which Mr. Harborne did, and Haynes acquiesced therein; but before the money was paid he died, having duly published his will, and appointed the defendants his executors. Application being afterwards made to the executors, and tender made to one of them of the £300, and the arrears of the annuity then due,

acceptance

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1 Ves. jun. 241.

Mr J. Buller for  
Lord Chancellor.

Parol evidence to prove that an annuity was intended to be redeemable (no such covenant being in the deed) is inadmissible.

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acceptance of the same was refused; on which this bill was filed.

The defendants, by their answers, admitted the facts, but said they could not set forth whether there was any agreement for the redemption of the annuity, and that being strangers to the terms on which the annuity was granted, and acting merely as executors under the will of *Haynes*, by which the said annuity was particularly disposed of among his children and grand-children, they were advised it would be improper to permit the plaintiff to redeem without being properly indemnified, and therefore refused so to do; and submitted the plaintiff's right to redeem, and said, that in case the Court thought he had such right, they were willing to act as the Court should direct.

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The cause came on to be heard before Mr. Justice *Buller*, sitting for *Lord Chancellor*.

Mr. *Solicitor-General* stated the case, and

Mr. Justice *Buller* asking why they did not proceed at law,

Mr. *Solicitor-General* observed, that the Court of law having a jurisdiction did not affect the jurisdiction of this Court: and proposed to read Mr. *Harborne's* evidence as to the agreement that the annuity should be liable to redemption.

Mr. *Mansfield* and Mr. *Stanley* objected to the evidence being read, as being an attempt to read parol evidence in contradiction to the bond which contained no provision for redemption, and cited *Lord Irnham v. Child*, (ante, vol. i. p. 92).

Mr. *Solicitor-General*.—That case is distinguishable from the present; there the persons against whom the redemption was sought denied the agreement. Parol evidence has never been admitted where the agreement in writing is the only agreement acknowledged, but where a further agreement is stated and not denied, or where it is left doubtful whether such agreement subsisted or not, it leaves it open to the party to introduce evidence of the agreement.

Mr. *Mansfield*, in reply, argued that this distinction would apply to the admission in all cases, as if the agreement was admitted, there could be no need of proof. Here it was necessary to prove it, the executors only saying they know nothing of the matter; and there being a necessity of proof, the plaintiff must prove it by such means as are consistent with the rules of law, which this evidence is not.

Mr. Justice *Buller*.—This is an attempt to introduce a very ingenious distinction with respect to the case cited, but which does not apply to it: It is only where the agreement is admitted that
relief

relief can be given. The question here is, whether it is necessary to prove the agreement; if necessary to prove it, the plaintiff must prove it according to the rules of law, which he has not done. I wonder he did not go into a court of law, if he could prove the agreement, which he might have done at a much less expence. If in a court of law he can establish this agreement by evidence against the rule of law, he may make it available (a).

Bill dismissed (b).

(a) An application was afterwards made to the Court of Common Pleas, where the judgment was entered, to order the securities to be delivered, and satisfaction entered up, which was refused, this evidence being held inadmissible. *Haynes v. Hure*, 1 H. Bl. 659. See more as to this, *Lord Irnham v. Child*, ante, vol. i. 92; and see Lord Eldon's observations in the *Marquis of*

Townshend v. Stangroom, 6 Ves. 333. cited in *Lord Portmore v. Morris*, ante, vol. ii. 219.

(b) "As to the costs, I think it would be right to say here, that in all cases where a man has got such an annuity as this for six years purchase, he may as well pay his own costs," per *Buller, J.* (Ves.)

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### MARSTON v. GOWAN.

**JOSEPH WHITEHEAD**, by will, 7th June, 1782, gave and devised to defendant *Gowan* and others, whom he appointed executors, copyhold estate in the parish of *Shipton*, in the county of *York*, (which he intended to surrender to the use of his will) to permit his mother (who was since dead) to take the rents, &c. for life, towards raising £20 annuity, which he was bound to pay her by bond, then in trust, to sell and pay this four sisters £50 each, which he was engaged to pay them by the said bond, (being the purchase of the copyhold estate from the mother,) the surplus of the purchase-money to be to the same uses as the residue of his personal estate, which uses were that the same be sold, and out of the purchase-money certain sums to be paid to the children of his sisters at twenty-one, and as to the residue, to lay out the same in stock, to raise a certain sum for his mother for life, and to pay the remainder of the interest and dividends, and, after the death of his mother, the whole interest to his wife for life, for her sole use and benefit, and after her decease to pay and assign the principal to the children of his sisters, in equal proportions, with further provisions as to such children.

The testator *Whitehead* died without revoking the will, and without surrendering the copyhold estate, which descended to his sisters, as the customary heirs:

And it becoming a question whether there could be a partial supply of a surrender in favour of the wife, the children of the sisters, who were to take a remainder in the price to be obtained

A surrender shall be supplied for a limited interest (a wife for life) though the devisees over (nephews and nieces) are not entitled to have it supplied for them.

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for the same, not being entitled to have such surrender supplied for them :

*Lord Chancellor* said, he did not see why a surrender should not be supplied for a limited interest, as well as a general one : he therefore ordered the copyhold to be sold, the wife to have the interest of the purchase money for life, then to result to the customary heirs (a).

(a) Upon the same principle, in the case of *Compton v. Collinson*, ante, vol. ii. 386, Mr. Justice *Buller* observed, that if a devise be for payment of debts, and subject to such payment to strangers, the heir would not be compelled to surrender, or make a

title to more than is sufficient to satisfy the debts; for the heir has equal equity, at least, with the devisee, and where the equity is equal the law must prevail. See more upon this subject in *Lindopp v. Eborall*, post, 188; and *Chapman v. Gibson*, post, 229.

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Res. jun. 143.

### ATTORNEY-GENERAL v. The MAYOR, &c. of the City of LONDON.

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AN information and bill, instituted and filed by the *Attorney-General*, at the relation of the Lord Bishop of *London*, and by the Bishop, stating that the Honourable *Robert Boyle*, by his last will and testament of 18th *July*, 1691, and a codicil to the same, of *December* in the same year, directed that the residue of his personal estate, after payment of debts and legacies, should be disposed of by his executors for such charitable and pious uses as they in their discretion should think fit, but recommended to them to lay out the greater part thereof for the advancement of the Christian religion, and appointed the Right Honourable *Richard Earl of Burlington*, *Sir Henry Ashurst*, and *John Warr*, executors of his said will, who after his death proved the same. The executors afterwards agreed to lay out £5,400 which was considered by them as the principal part of the testator's personal estate, in the purchase of the manor of *Brasserton*, in the county of *York*, and the lands therein contained, then the property of *Sir Samuel Gerrard*, with a view to settling the estate in such manner that the income thereof might be for ever applied to the advancement of the Christian religion, in the method following; viz. to grant out of the said manor a perpetual rent-charge of £90 *per annum* to the corporation for propagating the Gospel in *New England* and the parts adjacent in *America*, to be applied by that company as follows; viz. £45 *per annum* for the salary of two ministers, to instruct the natives in or near his Majesty's colonies in *New England*, in the Christian religion, and to transmit the other £45 *per annum* to the President and Fellows of *Harvard College*, in *New England*, and their successors, to be by them employed in the salary of two other ministers, to teach the natives in or near the college there the

the Christian religion, and subject to the said £90 *per annum*, to convey the said manor, &c. to the Mayor, &c. of *London*, and their successors, on trust, that the surplus rents and profits (after incidental charges) should be laid out for the advancement of the Christian religion in *Virginia*, in such manner as the Earl of *Burlington* and Bishop of *London* (for the time being) should under their hands and seals appoint, so as such appointment should be made on or before *Lady-day* 1697, and should be confirmed by a decree of the Court of Chancery. There being some delay in completing the intended purchase, the then Attorney-General and the executor of Sir *Samuel Gerrard* filed an information and bill in this Court against the executors of Mr. *Boyle* for a completion of the purchase, and establishment of the charity: which cause came on to be heard the 1st *August*, 1595, when it was referred to the Master to make certain enquiries; and the cause coming on again, upon the Master's report, on the eighth day of said month, a decree was made for the completion of the purchase, and for the before-mentioned method of disposing of the charity, with this addition, that an account of the said £90 *per annum* should, after the death of the Earl of *Burlington* and Sir *Henry Ashurst*, be sent to the President of *Trinity College, Oxford*, of which said *Robert Boyle* had been a member, as well as to the heirs of the said Earl, and Sir *Henry Ashurst*, and it was ordered, that after the purchase made upon trust the surplus rents, after the £90 and incident expences, should be laid out for the advancement and propagation of the Christian religion among the infidels in *Virginia*, in such manner, and subject to such regulations as Lord *Burlington* and the Bishop of *London* for the time being should appoint, so as the same should be made before 25th *March*, 1697, and be confirmed by this Court, and the executors should convey the manor to the City of *London* upon the trusts aforesaid; which grant and conveyance were afterwards made, and the said Earl of *Burlington* and the then Lord Bishop of *London* (according to their reserved power) by an instrument in writing of the 21st *December*, 1697, appointed certain rules as to the application of the charity of *Virginia*; amongst the principal of which were first, that the rents and profits of the manor (after the deduction of the £90 a year, and other expences) should be paid by the receiver, *Michajah Perry*, then of *London*, merchant, and agent for the President, &c. of the College of *William and Mary*, in *Virginia*, and to the future agent in *England* for the said College for the time being, for the purposes thereafter mentioned; 2d. That all sums so received should be remitted to the said President, &c. for the time being; 3d. That the President, &c. and their successors should thereout expend so much as should be necessary towards fitting and furnishing rooms for such *Indian* children as should be brought to the said College; 4th. That they should keep at the College so many *Indian* children in washing, lodging, books, education,

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education, &c. till they should be ready to receive orders, and to be sent to preach and convert the *Indians*, at the rate of £14 for each child, as the yearly income of the estate would amount to: 5th. That the care, instruction, &c. of the children should be left to the President and Masters of the College; but subject to the visitation of the Rector and Governor of the said College; 6th. That the President, &c. should once every year transmit an account of their receipts and disbursements to the Earl of *Burlington* and Lord Bishop of *London*, with the number and names of the *Indian* children, and their progress and proficiency in their studies; 7th. That the laying out the money, &c. should be subject to such future rules as should be transmitted to the said President, &c. by the Earl of *Burlington* and Bishop of *London*, or in default thereof by the Rector and Governor of the said College; 8th. That the Charity should be called "The Charity of the Honourable *Robert Boyle, Esq. of London, deceased.*" By a subsequent decree of this Court, pronounced 9th *June*, 1698, the said rules were ratified with these variations, that the yearly account ordered by the 6th rule to be transmitted to the Earl of *Burlington* and Bishop of *London* should be by them transmitted to this Court, to be filed by the register thereof, and with respect to the seventh rule, that such subsequent rules made by virtue thereof should be first confirmed and approved by the Court; and it was ordered that the said *Michajah Perry* should be the first receiver, and should appoint a receiver under him. And the information further stated, that since the said decree some merchant in *London* hath acted as agent of the College of *William and Mary* in *Virginia* for the purposes of the charity, and hath employed some person near the premises to receive the rents and profits, and transmit the same to the agent in *London*, (which have amounted to £300 *per annum* and upwards) who hath, till of late years, paid the rent-charge of £90 *per annum* to the corporation for propagating the Gospel, and remitted the surplus to the College of *William and Mary* for the purposes of the charity, and that there being in the year 1771, a considerable quantity of timber and other trees growing on the premises fit to cut, an information was exhibited in this Court in 1772, in the name of the *Attorney-General*, at the relation of the College, and their then agent *Osgood Hanbury*, against *The Corporation of London*, as trustees, and against the then Lord Bishop of *London*, as having the sole right to form regulations, &c. for the charity (the title of Earl of *Burlington* being then extinct) and against the Corporation for propagating the Gospel, praying that the timber might be cut down, and to have a scheme laid before the Court for the application of the money, for the advancement of the charity, which came on to be heard in 1773 before the then *Lord Chancellor*, who referred it to the Master to enquire what timber, &c. was proper to be cut, and that the same should be sold and cut under the inspection of a person to be appointed by him, and the money

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money to be produced by the sale should be paid into the Bank, with the privity of the Accountant-General, to the credit of the cause, and that the relators and Bishop of *London* should lay a scheme before the Master for the application of the money: that the timber was afterwards sold and cut under the terms mentioned, and produced the sums mentioned: that the then Lord Bishop of *London* dying, and Doctor *Lowth* being appointed Bishop, a supplemental information was exhibited. The information stated that the sums so received and laid out, by accumulations of interest, now amount to £13,849. 2s. 10d. 3 per cent. consols; no direction having been given by the Court as to the application thereof. And the information further stated, that on the death of Doctor *Robert Lowth* in 1787, the present relator *Beilby* was appointed Lord Bishop of *London*, and (as the title of Earl of *Burlington* is extinct) is the only person entitled to form, alter, and vary regulations, &c. for the management of the said charity, subject to the approbation of this Court: but no supplemental information or bill hath been filed for carrying on the said decree, and that he therefore is entitled to the benefit of the decree of 1773. And the information further proceeded to state that *Osgood Hanbury* continued to act as agent in *London*, for the College of *William and Mary*, till the time of his death in 1784, after which *John Lloyd*, of the city of *London*, was appointed, and still continues agent, and that *John Clough*, of the city of *York*, gent. now is and has long been receiver, but although the said *John Clough* has remitted several sums on account of the rents to the said *Osgood Hanbury* in his life-time, and since to the said *John Lloyd*, yet a large sum remains in his hands, and although *Osgood Hanbury* paid the £90 per annum to the Corporation for propagating the Gospel to *Lady-day*, 1782, he from that time ceased so to do, and although he for some years remitted the surplus rents to the College of *William and Mary*, he had for some years forborne so to do, and that the said *John Lloyd* had never paid any sums either to the said Corporation or to the College. The information then stated, that in 1775 the provinces of *New England and Virginia* fell into a state of rebellion against the King of Great Britain, and continued in that state till 1783, when they (with eleven other provinces in *America*, which were lately under his Majesty's dominion) were declared to be states independent of his Majesty and this kingdom, and they have still continued and are so, and therefore that all the inhabitants of such states are to all intents and purposes foreigners and aliens as to this kingdom, and therefore no further part of the rents and profits of the said manor or estates ought to be paid either to the said Corporation for propagating the Gospel in *New England*, or to the said President, &c. of the said College of *William and Mary*, for the charitable purposes aforesaid, or either of them, or any other person whatsoever, but that the money now due from the executors of *Osgood Hanbury*, or from

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from *John Lloyd* and *John Clough*, in respect to the said rents and profits, ought to be applied in some other manner in this kingdom, or in some part of his Majesty's dominions, for the advancement of the Christian religion, and the future rents applied for like purposes, and that the sum of £13,849. 2s. 10d. in the 3 per cent. consol. bank annuities, should be invested in lands, and the rents and profits thereof and the intermediate dividends should be applied to the like purposes. The bill therefore prayed to have the benefit of the suit in 1773, and of the decree therein, and for further directions, and that the money in the funds might be laid out in the purchase of lands, the rents and profits whereof, and of the manor, &c. and intermediate dividends to be laid out for the advantage of the Christian religion in *England*, and prayed accounts against the executors of *Hanbury*, and against *Lloyd* and *Clough*, and that they might be restrained from paying any more money to the College of *William* and *Mary*, or to the Corporation for propagating the Gospel in *New England*, and to have a new receiver appointed.

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The President, &c. of the College of *William* and *Mary* in *Virginia*, by their answer, state their charter from King *William* and Queen *Mary*, and insist, notwithstanding the circumstances, that they are entitled to the rents and profits of the estate. They further stated that they had been at expences upon the credit of the sums to be remitted to them, and claimed as creditors for the same.

*Harvard College* did not appear, and the others were principally formal defendants.

Upon the cause coming on to be heard,

Mr. *Attorney-General* and Mr. *Ainge*, on the part of the information.—The first question is, whether a new scheme ought not to be laid before the Court. The situation of things is much changed since the mode of application was settled by the executors, the circumstances of the colonies are now such that the Court cannot look to the application of any monies which may be paid to the College—it cannot see that the money shall be applied to the objects for which it was intended by the testator. The College state their claim as servants of the Court, they state that they had a charter from King *William* and Queen *Mary*, but whatever their former situation was, they cannot now be considered as a corporation: a corporation is the creature of the great seal, and as such they have ceased to be a corporation. They claim as trustees; but cannot be considered as such when the money paid to them would be out of the control of the Court. As to the annuity payable to the Corporation for propagating the Gospel in *New England*, they have applied the charity to countries adjacent to *New England*, and are still within the original decree. With respect to the other £45 to *Harvard College*, they are, precisely in the

same

same situation as *William and Mary College*. It has now therefore become a case of discretion in that Court as to the administration of the charity. As to the receiver he has made up his accounts, and paid the balance into Court, except about £300, which had been remitted before notice was given him not to do so in future.

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Mr. Mansfield and Mr. Mitford, for *William and Mary College*. The College are merely servants of this Court in the administration of the charity, and as fit now for that purpose as when the charity first began. The revolution has not rendered them less amenable to the jurisdiction of this Court than before, as they could then only be brought voluntarily before the Court. As to the existence of the College as a corporation, if that was intended to be brought into judgment, it should have been suggested in the information; but they are treated throughout as a subsisting College, and appear under their seal. Their *claim as such is preserved by the treaty of peace; by which every right of every corporation is left as it was before, the treaty of peace only recognizing the independence of the government*. Even in conquered countries the situation of permanent bodies remains the same as it was till altered by the conquering power: thus after the conquest of the *English* provinces in *France* there were several convents in them that had lands in *England*, and though the convents became subject to the Kings of *France*, their *English* lands, although during time of war they were seized into the King's hands, yet, in time of peace the convents enjoyed the rents till the time of *Henry* the Fifth, when the lands were taken into the King's hands (a). If the trusts do not subsist the lands would escheat to the crown. In the present case, the College states that a considerable sum is due for money expended in supporting the children whilst the agents withheld the profits. If they are not to be intrusted with the future administration they should be admitted as creditors for these sums, but there is no reason why they should not be intrusted as before.

Lord Chancellor, during the argument, said he could not see how the bishop's bill was to be sustained, he is only a trustee as to the mode of administration of the charity, and has not therefore any interest to sustain a bill. With respect to the College, suppose they should misbehave, where is the *scire facias* to be brought? Suppose a conquest *in regem*, the law would be the same, but the *scire facias* could never be brought in the court of the conquered king.

After the argument, he said that the trusts to the corporation to

(a) "The same thing happened to the Knights Templars and the Knights of Malta; they were religious institu-

tions, and it turned entirely upon that," per Lord Chancellor, Mr. Vesey's report.

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convert neighbouring infidels, ceasing for want of objects (there being now no neighbouring infidels), the charity must be applied *de novo*. As to the other parties, he could not now consider them as corporations: therefore the Master must propose a plan for the application of the produce of the estates, according to the intentions of the testator, Mr. *Boyle*(a).

Mr. *Mansfield* pressed for the costs of the college to be paid.

Lord Chancellor said, he was desirous to do it, but he did not know by what name to give them the costs. He, after consideration, ordered these costs to be paid to their agents.

(a) See this case cited in *Moggridge v. Thackwell*, 7 Ves. 59. and *The Attorney-General v. Stepney*, 10 Ves. 25. For the cases upon the *cy-pres* doctrine, vide *Moggridge v. Thackwell*, post, 517.

S. C.

1 Ves. jun. 347.

Executors cannot justify paying a legacy, payable at twenty-one, to the infant, or for his use, except for express necessities.

## DAVIES v. AUSTEN and Others.

**JOHN RICHARDSON**, Esq. by will, dated 8th December, 1770, gave all his personal estate to trustees, in trust, among other legacies, to pay to *William Horatio Green* (an infant) by the description of Master *William Horatio Green*, son of *Richard Green*, Esq. £500, and directed that such of his legatees as might be infants at the time of his decease should receive interest at the rate of £5 per cent. till their respective legacies should be paid, which he desired might be to the boys at the age of twenty-one years, &c.; and appointed the defendant, his daughter, dame *Ann Austen*, and others, executors, and died without revoking his will.

In the year 1780, the legatee *William Horatio Green*, went to the *East Indies*, being then still an infant, and soon after his attaining his age of twenty-one years sold his legacy of £500 under the will of his grandfather *Richardson*, to the plaintiff for 5,000 rupees, being equal in value to £625 sterling, and made an assignment and letter of attorney for the receipt of the same from the executors, who refusing to pay the same, for the reasons in the answer stated, the present bill was filed.

The defendants stated in their answer that *Richard Green*, the father of the legatee *William Horatio Green*, having died intestate and *Martha Green* his mother having given up her own jointure and provision, for the benefit of her husband's creditors, the legatee *William Horatio Green*, had no other provision than the legacy of £500, and an equal share with a brother and sister, in £670 three per cent. annuities, upon the death of his mother, who having married the reverend *Thomas Jones*, he had before the year 1780, expended in cloaths, schooling, &c. for the legatee, the sum of £150, and

and did afterwards, with the approbation of the executrix, place the legatee with the captain of an *English* vessel trading to *America*, and afterwards the legatee taking a dislike to that way of life, he gave the captain a sum of money to release his engagement, amounting together to a sum exceeding £100. That afterwards the legatee having shewn an inclination to a military life, Mr. Jones, with the approbation of the executrix, placed him at Mr. *Lochee's* military academy, and paid for expences there the sum of £100, and an opportunity having offered of sending the legatee with advantage, in the service of the Company to *India*, he fitted him out for *India*, and in the expences of sending and paying for his passage, and also providing him with money for his immediate expences there, £200 were expended, in the whole amounting to £650, which the executors conceived were necessarily and properly laid out for his maintenance and advancement, and in consequence whereof, he had given a receipt to Mr. Jones, for the sum of £500, and had, before he sailed for *India*, made a will, whereby he had given the said sum of £500 to him; they also further stated that the interest had been paid to the legatee's mother whilst she continued unmarried, for his maintenance, and afterwards to her husband, the said *Thomas Jones*.

Mr. *Solicitor-General* for the plaintiffs, insisted that in this case the Court could make no allowance for the sums beyond the interest expended in the maintenance or provision for the legatee, even if he were now suing for the legacy; much less against an innocent assignee, who, it appeared, had paid a full price for the assignment of this legacy.

Mr. *Attorney-General* and Mr. *Sutton*, for the defendants, the executors, argued that these were sums of money paid for necessary expences, and for his provision in the line of life in which he stood: that in some cases, executors had been held justified in paying legacies to infants themselves, as in *Phillips v. Paget*, 2 Atk. 80. and that money laid out in a child's education, has been allowed out of the principal of a legacy (*Barlow v. Grant*) 1 Vern. 255. and was considered as most advantageous and beneficial to the infant; that if a person lends money to an infant, which is paid by him for necessities, the person lending shall stand in the place of the creditor, and that as in this case the second husband of the mother was not bound to provide for him, the executors supplying his wants, stand in the place of any other person who might supply him with necessities, and as the plaintiff is only an equitable assignee, he can only be entitled to stand in the same situation with the infant himself, and is consequently liable to those demands to which the infant himself is liable. *Marlow v. Pitfield*, 1 P. W. 558.

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Lord Chancellor said, the plaintiff did not argue the case higher than if it was the infant himself who sued. Every one who takes an assignment of a *chose in action* gives credit to the assignor that there is no lien upon it (a).

But in this case his Lordship was not satisfied that it was for necessities; in particular he thought the £100 to the *American* trader was too much.

He therefore decreed the legacy to be paid, with interest from the legatee attaining his age of twenty-one (b) (c).

(a) That the assignee of a *chose in action* takes it liable to all the equity that it was subject to in the hands of the assignor, vide *Coles v. Jones*, 2 Vern. 692. and Mr. Raithby's note. *Turton v. Benson*, ib. 764. *Hill v. Caillorel*, 1 Ves. 122. *Cator v. Burke*, ante, vol. i. 434.

(b) Defendant decreed to pay £500 with interest, at 4 per cent. from the time he came of age. Costs refused—(Vesey.)

(c) As to the principal point in the cause, vide *Cooper v. Thornton*, post, 186.

### HILL, Bart. v. BROUGHTON, Bart.

A charge was made raisable when A. or his issue should come into possession; a jointress who had an estate for life, conveyed to a trustee, in order to enable A. (who was tenant in tail in remainder) to suffer a recovery, which he did. Having such an interest as enabled him to suffer a recovery; held by Lord Chancellor to be coming into possession within the terms of the deed, and to make the charge raisable.

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BY indentures of lease and release of 10th and 11th August, 1727, made between Sir Thomas Delves, Bart. and Dame Rhoda, his wife, of the first part; John Broughton, Esq. and others, of the second part; and Thomas Boulby Skrymshire, Esq. and others, of the third part; the manor of Daddington was (*inter alia*) conveyed to the trustees of the second part, to the use of Sir Thomas Delves for life, remainder to the heirs male of Sir Thomas Delves, remainder to Dame Rhoda for life, remainder to the trustees to raise £5,000 for Jane Broughton, an infant, granddaughter of Sir Thomas Delves (afterwards Jane Hill, wife of Sir Rowland Hill, and mother of the plaintiff) remainder to the trustees of the third part, for 1000 years, upon the trusts after expressed, remainder to Sir Brian Broughton, Bart. since deceased, brother to said Jane Broughton, remainder to the trustees of the third part, to preserve contingent remainders, remainder to the first and other sons of Sir Brian Broughton, in tail male; and the said indenture contained a proviso, that *whensoever Sir Brian Broughton, or any issue of his body, according to the limitations aforesaid, shall come to and be seised of the present and immediate use and estate of freehold in possession, of and in the said manor of Daddington, expectant on the said term of 1000 years, herein limited to the said trustees (of the third part) and the said Jane Broughton, or any issue of her body shall be then living, then the said manor, &c. should stand charged with the further sum of £5,000, to be paid unto the said Jane Broughton, or such her issue, within two years after the said Sir Brian Broughton, or his issue, should come to and be in possession of said manors, &c.; and*



and the said term of 1000 years was limited to the said trustees (of the third part) for the purpose of securing the same; but the said £5,000 was not to be raised during the life of Dame *Rhoda Delves*.

Sir *Thomas Delves* died 4th September, 1727, without leaving issue by Dame *Rhoda*, by which all the limitations previous to that to the trustees (of the second part) became determined, except the life estate of Dame *Rhoda Delves*, by which the trustees (of the second part) were empowered to raise the first sum of £5,000 for *Jane Broughton*: the said £5,000 was accordingly raised, and paid under a decree of the Court, and the same was settled on the marriage of the said *Jane Broughton* with Sir *Rowland Hill*; in which settlement was also a provision, that the further sum of £5,000, if it should become due, should also be applied to uses therein declared.

A new settlement of the estate was afterwards made, in 1743, under which a like term of 1000 years was limited to the trustees of the third part, in the former settlements; remainder (subject to Dame *Rhoda's* life estate) to Sir *Brian Broughton* for life, *sans* waste; remainder to trustees, to preserve contingent remainders; remainder to *Brian Broughton* (afterwards Sir *Brian Broughton Delves*) then only son of Sir *Brian Broughton*, in tail; remainder to the second and other sons of the first Sir *Brian Broughton*, in tail, with remainder over; and the uses of the 1000 years term were declared to be as before.

Sir *Brian Broughton* died 11th August, 1744, in the life-time of Dame *Rhoda*, leaving two sons, *viz.* *Brian Broughton* (afterwards Sir *Brian Broughton Delves*) and *Thomas Delves*, now Sir *Thomas Broughton*, Bart. (a defendant).

Sir *Brian Broughton Delves*, upon the death of his father, became tenant in tail in possession, of several of the estates comprised in the indenture of 1727 and 1743, but with respect to the manor of *Daddington*, &c. which was settled on Dame *Rhoda* for life, he became tenant in tail in remainder expectant on the determination of her estate for life, and subject to the trust term of 1000 years; and the said Sir *Brian Broughton Delves* suffered a recovery of the said estate, and in order to enable him so to do, by indenture of 27th and 28th August, 1762, Dame *Rhoda* conveyed her estate to Sir *Rowland Hill*, in trust, to convey the same to Sir *Brian Broughton Delves*; and Sir *Rowland Hill* joined in a conveyance with Sir *Brian Broughton Delves*, to make a tenant to the freehold.

Sir *Brian Broughton Delves* entered in pursuance of the deed, and died 17th January, 1766, without issue, leaving his brother, *Thomas Delves* (now the defendant, Sir *Thomas Broughton*) his heir at law, and having made his will, dated 21st May, 1764, and thereby devised his estates in the county of *Chester* to trustees, to the use of his brother (now the defendant Sir *Thomas Broughton*)

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for life, remainder to trustees to preserve, &c. remainder to the first and other sons of his said brother, in tail male, with remainder over.

Dame *Rhoda Delves* died 17th *January*, 1772, and Dame *Jane Hill* died 17th *December*, 1773, leaving Sir *Rowland Hill*, her husband, the plaintiff, and her eldest son, and other children, surviving her.

Sir *Rowland Hill*, claiming to be equitably entitled to the further sum of £5,000, so provided for the said Dame *Jane Hill*, by indenture of 29th *September*, 1780, between Sir *Thomas Broughton*, of the one part, and Sir *Rowland Hill*, of the other part, reciting the deaths of the several parties; and that Sir *Rowland Hill*, as representative of his wife, and in her right, was become entitled to the £5,000, Sir *Thomas Broughton* made a charge of the £5,000 on his estates.

Sir *Rowland Hill* died 7th *August*, 1783, having made his will, and a codicil thereto, and thereby declared that the provisions he had made for his younger children were in satisfaction for their portions under his marriage settlement; he gave the residue of his personal estate to the plaintiff, and made him executor, by which plaintiff became entitled to the £5,000.

Sir *Thomas Broughton* has issue, *Delves Broughton*, his eldest son, who, as first son of the body of Sir *Thomas Broughton*, was tenant in tail, under the will of Sir *Brian Broughton Delves*; and Sir *Thomas Broughton*, and *Delves Broughton*, have suffered a recovery of the estates to themselves in fee-simple.

The term of 1000 years has vested in the defendant, *John Hill*.

The plaintiff applied for payment of the £5,000, and Sir *Thomas Broughton* having refused to pay the same, the present bill was filed, praying that the sum might be raised from the estate charged therewith, and paid to the plaintiff.

The defendants, Sir *Thomas Broughton* and *Delves Broughton*, by their answer, said, that the security executed by Sir *Thomas* to Sir *Rowland Hill*, for the £5,000, was executed under a mistake, and therefore ought not to bind the estates, unless the same were chargeable therewith under the indenture of the 11th *August*, 1727, and insisted, that under the circumstances of the case, the said sum was not now to be raised by virtue of the clauses in the indenture of release of 11th *April*, 1727.

The question was, whether the event had happened, upon which the sum was to be raised, i. e. whether Sir *Brian Broughton*, or any issue of his body, had come to and been seised of the present and immediate use and estate of freehold in possession, in the manor of *Daddington*, according to the limitations in that deed, the plaintiff contending that the event had happened, the defendant that it had not, and that Sir *Brian Broughton Delves* did not come into possession under the limitations of the deed, but that the recovery having been suffered in the life-time of Dame *Rhoda*, Sir *Brian*

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Brian Broughton Delves became seised of the estates in fee-simple in remainder, after the estate for life of Dame *Rhoda*, and that he *Sir Thomas* did not at her death become seised under the indentures of 1727 or 1743, but by virtue of the recovery suffered by *Sir Brian Broughton Delves* and his will.

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Mr. *Attorney-General*, for the plaintiffs, contended—that in this case *Sir Brian Broughton* had come into possession of this estate, within the intent and meaning of the deed, that it is not universally true that a person who suffers a recovery obtains a new estate, that here he derived his power of suffering the recovery from the estate tail, and therefore the coming to the estate tail was sufficient to make him liable under the deed.

There is a case, 1 Wils. 66. (*Martin*, on the demise of *Tregonnell v. Strachan*) (a) which shews that a person who suffers a recovery, shall not always be considered as taking a new estate, but that the estate shall go to the old uses; in that case a distinction was taken between an estate by descent, and one by purchase. In the present case, the act done is the act of the remainder-man, who would by his own act destroy the charge. Courts of equity have gone a great way in cases of this kind. Where an infant has a term, and the fee descends, and the infant disposes of the term, it is not considered as a merger of the term. *Powel v. Morgan*, 2 Vern. 90. *Thomas v. Keynish*, S. B. 348. (b). So with respect to the interpretation, as to coming in under certain persons or limitations; if there be an intimate connection between the acts, it is held to be a coming in under the limitation, Dougl. 733. So, within the meaning of this proviso, a person who took an estate tail, and thence acquired the ability of gaining the fee, must be held to have come in under the limitations.

Mr. *Solicitor-General* and Mr. *Campbell*, for the defendants.—In the present case, *Sir Thomas Broughton* is reduced to the state of a mere tenant for life. The estate derived under the recovery, is as much a new estate as if the recovery had been made to a purchaser in fee, who had afterwards devised to *Sir Thomas*

(a) This celebrated case is also reported 2 Stra. 1179, but the best account of it is in 5 T. R. 107. n. where the judgment delivered in the Court of K. B. by *Lee*, C. J. is given at length. It deserves the greatest attention, as containing one of the most luminous and masterly accounts of the doctrine of Common Recoveries in existence. There was afterwards a writ of error to the House of Lords, 6 Bro. P. C. ed. Toml. §19. where the case was very elaborately argued by Mr. *Henley*, afterwards Lord Northington, for the defendants. A copy of his argument will be found in *Hargrave's*

MSS. in the *British Museum*, No. 73. The opinion of the Judges was delivered by *Willes*, C. J. which is printed in his reports, p. 444. It appears from the same number of the *Hargrave* MSS. that the defendant, and all the heirs of Mr. *Banks*, *ex parte paternâ*, were, after the judgment in the House of Lords, discovered to be aliens, and fresh ejectments were accordingly brought, of which, however, there is no account.

(b) For the cases upon this subject, vide the Editor's note to *Lord Compton v. Oxenden*, post, vol. iv. 403.

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Broughton for life. *Lady Hill* was only to have the £5,000 in particular events; if the *Broughton* family did not come into the immediate use and possession of the estate, she was not to take, it was only upon the event of their coming into such immediate use and estate of freehold in possession, that the lands were to be charged with the further sum of £5,000. If *Lady Rhoda* had surrendered her life estate, *Sir Brian Broughton* would have been in possession, and then the charge of £5,000 would have taken place; but *Lady Rhoda* conveyed her estate in such a way as not to bring forward *Sir Brian Broughton's* estate. If the uses of the recovery had been to a purchaser, the case provided for could certainly not have been held to have arisen, because it would not have been within the limitation. Then why should not the power of the parties be as great to bar *Lady Hill's* claim on the estate, as the subsequent limitations after the estate tail? Then the question is, whether this has not been done by having reduced *Sir Thomas Broughton* to a mere tenant for life. According to the words, *Sir Brian Broughton* or his issue were not only to be seised of the estate, but were to come to the possession, and to be in possession of the immediate use, and the money was to be raised within two years after. If a power of jointuring had been given to *Sir Brian Broughton* in these words, the recovery would have barred it. *Dame Rhoda's* conveyance to *Sir Rowland Hill*, kept her estate alive. If the settlor had meant the charge to take place if *Sir Brian Broughton* came to it *quocunque modo*, it would have been easily done so as to answer that intention; but he looked to *Dame Rhoda's* estate being spent.

Lord Chancellor, during the argument, and at the close of it, spoke to the following effect.—The question is, whether he did not come into possession within the limitations: the uses of the recovery springing from his estate, can he take them, and qualify himself as not being in possession; if the estate was entirely gone by the concurrence of the party, I think the charge would accrue. The question is, whether a stranger can be deprived of the bounty of the settlor, by the act of the tenant for life, and tenant in tail. The case from *Douglas* goes upon much larger words. The charge here would be raisable during *Lady Rhoda's* life, or within two years. The only question is, whether a person who conveys an estate is not to be considered as in possession. If there had been a forfeiture or a surrender, the tenant in tail would have come into possession; his coming in by fine and recovery is the same thing; the tenant for life and the tenant in tail joining makes no difference.

The charge must be raised, with interest at £4 per cent. from two years after the death of *Lady Rhoda*.

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COOPER v. THORNTON.

AN appeal from the decree at the Rolls, reported ante, p. 96. where the case is stated.

A legacy given to "A. to be divided between himself and his family," the executor pays the legacy to A. it is well paid to discharge the executor.

Mr. Mansfield, Mr. Selwyn, and Mr. Cooke, for the appellant, argued—that his Honour's decree was erroneous, and the payment to the father was a bad payment; no trust was reposed in the father by the testator, who intended his executor to divide the fund, which was more extensive in its objects than merely the father and his children. The word used is *family*, which is more extensive than children; all the children except *Henrietta* were adult, as to them there cannot be a pretence that the payment to the father was good; all the cases agree that such a payment is bad, *Dagley v. Tolferry* was not the first case upon the subject, there had been a former decision to the same purpose, in *Strickland v. Hudson*, 3 Ch. Rep. 168. The decree is rightly reported in *Dagley v. Tolferry*, it is agreeable to the Register's book (a). *Cunningham v. Harris*, in the Exchequer, 29th June, 1768, was as follows: *Robert Harrison* made his will 5th May, 1768, and bequeathed the sum of £100 to the plaintiff *Maria*, by the description of his nephew's daughter *Maria Harrison*, and appointed *Christopher Harrison* and *Richard Harrison* executors, who are both dead, and the defendants were the executors of the survivor. The executors long since paid the legacy to the father of *Maria Cunningham* (the plaintiff) she being an infant at the time of the death of the testator, and the father executed a release or discharge of the legacy: the executors admitted assets in their hands sufficient to answer the legacy, if the former payment was not good, but strongly insisted upon the hardship of the case, more particularly as the plaintiff *Maria* took considerable benefit under the will of her father; to this it was answered, that the payment to the father was bad, and although the plaintiff *Maria* took benefit under her father's will, yet his executrix had wasted the assets, and that benefit would not prove effectual, and that freehold and copyhold property which the plaintiff *Maria* became entitled to upon the death of the father, did not accrue to her by his will, but by settlement. The Court expressed great reluctance in establishing the demand made by the bill for this legacy, but said, the rule was now firmly settled, that a legacy to an infant cannot be paid to the father, and they decreed that the defendants, out of the assets of the testator in their hands, pay to the plaintiff the legacy, with interest after the rate of 4 per cent. and the plaintiff's costs. This is a decisive judgment on the subject. In the present case the father was insolvent, and the money seems not to have been paid, but allowed

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(a) Vide Lord Alvanley's observations on *Dagley v. Tolferry*, 4 Ves. 367. et seq. out

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out of a debt he owed to the testator. His Honour relied on the word *himself*, but there can be nothing stronger in the word *himself* than *him*, and if it had been to be divided between *him* and his *family*, the executor must have made the division. But if the bill should have been dismissed, it should not, in so doubtful a case, have been with costs; there was ambiguity enough in the case to justify the filing of the bill.

Lord Chancellor.—The question is, whether the testator meant to charge the executors with payment, or he meant to discharge them upon payment to the father.

It is true, that where the gift is generally to the children, it is a charge on the executor. It is a difficulty imposed upon him, to have a sum of money to pay to children.

In the present case, I can understand the testator no other way than that he meant to discharge the executors; and that it should be paid to the father to divide it among them.

If it had been expressly given to him to divide it according to his discretion, the payment to him would be a good payment.

I think in this case the father might have sued for this legacy in the Ecclesiastical Court, and, according to the late determinations, might have brought an action (a).

Decree affirmed (b).

(a) These determinations (*Atkins v. Hill*, Cowp. 284. and *Hawkes v. Saunders*, ib. 289.) were afterwards overruled in *Deeks v. Strutt*, 5 T. R. 690.

(b) See a similar determination in *Robinson v. Tickell*, 8 Ves. 142. Vide also *Lee v. Brown*, 4 Ves. 367.

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LINDOPP v. EBORALL.

Copyhold estate shall not pass by general description, where there is freehold to satisfy the words, though it had been supposed to be freehold, and the first devise was for payment of debts, and then given to a younger child otherwise provided for.

THOMAS EVETTS, by his will, devised and bequeathed unto *Thomas Fisher* and *Richard Archer*, all and every his messuages, cottages, lands, tenements, hereditaments, and real estates whatsoever, situate and being within the parishes of *Northend*, *Knightcot*, and *Shottery*, or either of them, in the county of *Warwick*, and also all and every his messuages, cottages, lands, tenements, and hereditaments, situate in *Sardon*, *Shareshill*, *Pel-sall*, *Essington*, or *Chisllyn Hay*, in the forest of *Cannach*, in the county of *Stafford*, and also all other his messuages, cottages, lands, tenements, and hereditaments, and real estate whatsoever, situate, lying, and being in the counties of *Warwick* and *Stafford*, or elsewhere within the kingdom of *Great Britain*, not settled in jointure upon his wife, with their and every of their appurtenances, in trust, to sell and dispose of the same to pay his debts and legacies, and then gave his personal estate, in trust, to be

Be sold for the same purposes. And the clear surplus of the produce of the real and personal estate, after debts and legacies paid, to be invested in government security, and the interest to be paid to his wife for life, and the principal to his daughter *Anne*, and the issue of her body, if she attain twenty-one, and in default, to his son *Thomas Evetts*, in like manner, and in default over.

The testator died, leaving *Thomas*, his heir at law and customary heir, (who married the defendant *Mary*) and *Anne*, the plaintiff in the revived bill, who claimed a small copyhold in *Pelsall*, of about £7 a year, under the will, having attained twenty-one.

The defendant *Mary*, the widow of *Thomas Evetts*, the deceased son of the testator, claimed it under a settlement made upon her marriage for her life, with a power of disposing of it, given by the settlement, in default whereof it was limited to the right heirs of her husband.

It was charged in the bill, and admitted by the answer of *Mary*, that in 1722, this copyhold was purchased by *Thomas Evetts*, the grandfather of the testator, and surrendered to him in fee, and he was duly admitted, that from him it descended upon *Barlow Evetts* his son and heir, who was never admitted, and from him upon *Thomas* the testator, as his son and heir at law, and he was never admitted. That *Thomas* made the devise before stated, and had freehold estate situate in *Pelsall*. *Thomas* had lately discovered it was copyhold, had been admitted, and had surrendered to the uses of the settlement.

The bill prayed, that the copyhold might be decreed to pass by the will.

Mr. Solicitor-General, and Mr. Simeon, for the plaintiff.—The only question is, whether this copyhold estate would pass, in equity, for the payment of debts, and for the purpose of giving it to *Anne* the younger child. There is not a doubt of the testator's intention, and that he thought it was a freehold estate, and meant to pass it. And it is strictly *within the rule for supplying surrenders*, being for the payment of debts, and for a younger child. Notwithstanding the general rule, that copyholds shall not pass unless expressly named or described, the Court will consider them as passing where they are necessarily implied even by the words "lands, tenements, and hereditaments." *Drake v. Robinson*, 1 P.W. 443. *Haslewood v. Pope*, 3 P.W. 323. *Mallabar v. Mallabar*, Forr. 79.

Lord Chancellor (without hearing the other side) held—that it did not pass, for although, where the copyhold is necessary to pay debts, it is held equivalent to a description of it, yet here it *not being necessary* for that purpose, it should not pass for the further purpose of going to the younger child: the Court had only held

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v.

ERRALL,

held that, where the child *was unprovided for*, not where the question was as to the *more or less* of the provision to which the intention could never be held to apply (a).

(a) A court of equity supplies the want of surrender to the uses of a will for three sorts of persons, *wife, creditors, children*. For the doctrine as to the first, vide *Chapman v. Gibson*, post, 229. As to the second, *Kentish v. Kentish*, post, 257. As to the last, vide Mr. Cox's note to *Watts v. Bullas*, 1 P. W. 60, 1. Watkins on Copyholds, 211. Scriven on Copyholds, 135. Sugden on Powers, 341. *Rumbold v. Rumbold*, 5 Ves. 65. *Hills v. Downton*, 5 Ves. 563. *Blunt v.*

Clitherow, 10 Ves. 589. *Fielding v. Winwood*, 16 Ves. 90. *Garn v. Garn*, ib. 268. *Sampson v. Sampson*, 2 V. & B. 337. That this equity is not extended to grand-children, vide *Parry v. Whitehead*, 6 Ves. 544. nor to a natural child, *Cricket v. Dolby*, 3 Ves. 10. in which two cases the former authorities are collected. As to the doctrine of the Court, with respect to the provision of an heir at law against whom a surrender is to be supplied, vide *Chapman v. Gibson*, cit. sup.

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Lincoln's-Inn
Hall, 11th Dec,

HOUGH v. WILLIAMS.

Where parties go before the Master upon a reference, he must receive interrogatories from both, though one of them should not have gone into any proof in the former stage of the cause.

THE bill was filed to set aside certain securities obtained by the defendant from the plaintiff.

The general nature of the case was, that the plaintiff was a young man in expectation of a large property which was in this Court, and having occasion for money applied to the defendant, who is a taylor, to help him to it; that on such application, the defendant sold to the plaintiff, at different times, horses and cattle, at very extravagant prices, which the plaintiff had turned into money at a great loss. For these articles, the plaintiff had entered into bonds and warrants of attorney to confess judgment to the defendant. The bill charged, that the horses and cattle, &c. sold, were sold at prices far beyond their real value, and stated the loss sustained by each particular sale: and the plaintiff had given evidence of this, but the defendant had entered into no proof as to it.

Mr. Justice Buller sitting for Lord Chancellor, had made a decree that the Master should take an account of what the horses and cattle were really worth at the time of their respective sales, and that the bonds and warrants of attorney should stand as a security only for what the Master should find them really worth.

When the parties went before the Master upon this reference, the defendant offered to exhibit interrogatories, for the examination of witnesses to prove the real value of the horses and cattle at the time when they were sold, but the Master refused to receive them, on the ground that the point had been expressly put in issue in the cause, and the defendant might therefore have examined witnesses to this point in the cause.

It

It was moved on the part of the defendant, that the Master might be directed to receive these interrogatories; and

Lord Chancellor said—he could not conceive how the Master could doubt about it; for the decree implied that the Master was to receive evidence as to the value: and directed the Master to receive the interrogatories (a).

(a) See the case of *Sandford v. Paul*, post, 370, and the Editor's note to it.

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Ex parte WARDER, in the Matter of WHITESIDES, a Bankrupt.

Lincoln's-Inn
Hall, 29th Dec.

THE petitioner had arrested the bankrupt before the commission, and charged him in execution after the commission; he never proved his debt under the commission; the bankrupt obtained his certificate, and the petitioner then applied to the commissioners to prove the debt: which they refused, on the ground that the debt was discharged by the creditor having kept the bankrupt in execution, and elected that remedy, without attempting to prove the debt under the commission.

Arresting the
bankrupt before
commission, and
keeping him in
execution after
an election.

The petition prayed to be admitted to prove this debt.

And Mr. *Cooke*, in support of the petition, mentioned *Blumfield's* case, in 5 Rep. to shew, that where an execution, by *ca. sa.* was defeated by the act of God or of the law, the debt was not satisfied by that execution; and argued it was defeated here by the act of the law.

But *Lord Chancellor* said—the creditor not having proved his debt under the commission (in which case he might have been put to his election) had elected it to take his remedy at law, and must take the consequences of it: and

Dismissed the petition (a).

(a) This is, probably, the same case, as the one under this name in *Cooke's* B. L. 7th edit. 149. It appears by that report, that the petitioner being in *America*, his agent here thought proper to charge the bankrupt. The commission issued on the 7th of *August*, 1789, the bankrupt having been taken in execution at the suit of other creditors. The action was commenced in *June*, 1789, and in *Easter Term*, 1790,

the bankrupt was charged in execution at the petitioner's suit. The petitioner did not arrive in *England* till afterwards. A similar point was determined in the same bankruptcy, *Ex parte* Cator, post, 216. See, upon this subject, *Ex parte* Cundall, 6 Ves. 446, *Ex parte* Knowell, 13 Ves. 192. *Ex parte* Parquet, 14 Ves. 493. *Ex parte* Arundel, 18 Ves. 231.

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Lincoln's-Inn
Hall, 11th Dec.
3d Seal after
Term.

After an order to
speed the cause,
the plaintiff has a
whole term and
vacation to pro-
ceed in, before
the bill can be
dismissed.

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MANGLEMAN v. PROSSER.

MR. *Emlyn* moved to dismiss the bill with costs, upon the ground that, on a former motion, for the same purpose, on the eleventh of last month, there had been an order to speed the cause, and no proceeding had been had since. He insisted, that by the course of the Court there must be a proceeding within one month.

But *Lord Chancellor* having consulted the Register, and the gentlemen best acquainted with the practice of the Court, who agreed that the plaintiff, after such order, had a *whole term and vacation* to proceed in, before the bill should be dismissed.

Refused the motion (a).

(a) This practice was followed in the late case of *Finlay v. Wood*, 1 Ves. & Bea. 499. According to the practice, as recently settled upon this subject, the motion to dismiss for want of prosecution after three terms, without replication, is of course; notice being neither proper nor necessary: the motion cannot be opposed, and the plaintiff has not therefore an opportunity of undertaking to speed the cause, which had been much com-

plained of as an instrument of delay; nor is the production of the Six Clerk's certificate, necessary at the time of making the motion; it is sufficient if produced to the Register before drawing up the order, *Desgraves v. Lane*, 15 Ves. 291. *Pitt v. Watts*, 16 Ves. 126. *Naylor v. Taylor*, ib. 127. *Jackson v. Purnell*, ib. 204. *Brown v. Byne*, 1 V. & B. 310. *Fuller v. Willis*, 3 V. & B. 1. *Day v. Ince*, ib. 170.

S. C.

[1 Ves. jun. 257.

Lincoln's-Inn
Hall, 14th Dec.

A portion given
after a legacy,
shall not be a sa-
tisfaction of it,
where it is ex-
pressly given in
satisfaction of a
different claim;
or where it is
given absolutely,
and the legacies
under limitations.

Neither can a le-
gacy be a satisfac-
tion for a claim
abunde, unless
clearly expressed
to be so intended.

Where the suit is occasioned by a difficulty in discovering the testator's meaning, the costs shall come out of the fund.

BAUGH v. REED (a).

THE testator *James Reed*, the elder, had six children, *James, Sarah, Mary, William, Thomas, and Charlotte*, who were entitled under the will of their grand-father *William Martin*, upon their attaining their respective ages of twenty-three years, to two sums of £5,000 each, making £10,000, which had been paid into the bank, in consequence of an order of this Court, and laid out in the purchase of £11,315. 8s. 4d. three per cent. Bank annuities, which being divided into six parts, came to £1,885. 18s. and a fraction of a penny each; and such of the children as had attained their ages of twenty-three before the testator made his will, viz. *James, Sarah*, (now *Jones*) and *Mary*, (late *Fydell*, deceased), had applied for their shares, which had been transferred to them; and *James Reed*, (the eldest son) transferred his sixth, 4th September, 1783, to the testator his father; *Sarah*, (the

(a) Reg. Lib. A. fol. 233.

eldest

eldest daughter) on the 8th of *February*, 1784, executed a power to the house of *Escot, Reed, and Co.* for transferring her sixth of the said stock; (but the same was a general power to accept, receive dividends, and transfer, not naming to whom). The daughter *Mary*, and her husband, *Richard Fydell*, by their marriage articles, dated 24th *March*, 1784, covenanted that her sixth should become the property of her father; and, 29th *April* following, it was transferred into his name. *William Reed*, the next son, 4th *August*, 1784, transferred his sixth into the name of his father. On the 30th *July*, 1784, the testator made his will, (being then possessed of £32,771. 16s. 2d. Bank, three *per cents.*) and thereby gave to his son the defendant *James Reed*, defendants *Elton and Dyson*, and his son defendant *Thomas Reed*, £8,114. 1s. 11d. three *per cent.* consolidated Bank annuities, part of his capital therein, in trust to pay the dividends to his son *William Reed*, for life, and after his decease to divide the principal among his children or grand-children, &c. and he gave to the same trustees three like sums of £8,114. 1s. 11d. in the same stock, other part of the said capital therein, in trust for his son *Thomas*, and his daughters *Sarah* and *Charlotte*, and their respective children and grand-children; and he gave to the same trustees £3,103. 9s. of the said fund, other part of his capital therein, for his daughter *Mary Fydell*, (to whom he declared he had already given a fortune,) and her children and grand-children; and gave the residue to his son *James Reed*, whom he appointed executor.

After making of the will, on the 1st *September*, 1785, (the testator, being then possessed of £34,657. 14s. 2d. Bank three *per cent.* annuities) plaintiff *Charlotte* intermarried with plaintiff *Isaac Baugh*, and by their marriage settlement, plaintiff *Isaac Baugh*, in consideration of £5,000, in Bank three *per cent.* consolidated annuities, which were to be accepted by him as the portion of *Charlotte* his wife, and in satisfaction of her contingent right to the legacy given by her grandfather's will, covenanted, within one month after she should attain her age of twenty-three years, to release her share of the said legacy to her father.

The bill was filed for the plaintiff's legacy (a) —

And two points arose, 1st. A question whether the portion given to the plaintiff *Charlotte Baugh* was, *pro tanto*, an ademption or a satisfaction for her legacy under her father's will? 2d. The other, whether the £1,885. 18s. which continued to stand in *Mrs. Jones's* name, was her property or the property of the father?

As to this latter point, a great deal of evidence was read; particularly that of *James Reed* the brother, who swore, that the

(a) The Master of the Rolls sitting for the Lord Chancellor, had directed the accounts, and an enquiry as to the share of *Mr. Jones*, upon which the Master reported against the defendant

Jones. Exceptions were taken to the report, and the cause now came on upon the report, and for further directions.

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power of attorney was given for the purpose of a transfer to the father, which had not been made by mistake, but he had received the interest till his father's death, and carried it to his account. On the contrary, evidence was read in support of the answer, that at the time she executed the power of attorney, she was very ill, and scarcely knew what she did, and that she received no consideration for it. If this £1,885. 18s. was included in the father's stock, it was sufficient to pay the specific legacies, and to leave a surplus; if not, the consequence was, that there would be a deficiency (a).

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Mr. Solicitor-General and Mr. King, for the plaintiffs.—The first question is, whether the £5,000 portion is, *pro tanto*, a satisfaction for the £8,000 legacy or not; we contend that it cannot be so considered. Where a parent gives a portion, after a legacy, it must be admitted that it is, in general, to be considered as a satisfaction of the legacy; but it is not so where the parent expressly points out for what it shall be a satisfaction; that is done here, for it is taken, by the settlement, in satisfaction for the £1,800, to which she was entitled under the will of her grandfather. Without the settlement, she would have been entitled to the £8,000 legacy, and the £1,800, but this last is expressly satisfied by the portion. Then the question is, whether the portion which is granted absolutely, by the father as his own money, and without any limitations, shall also be as a satisfaction for the legacy which is given to Mrs. Baugh for life, and then to her children or grand-children.

With respect to the other point, it is our client's interest to contend that the share intended to be transferred by Sarah, ought to be considered as part of the father's personal estate. The fund will not be sufficient to pay the specific legacies, unless this is considered as part; the evidence all tends to shew the father considered it so; all the other children, as they attained twenty-three, had transferred their shares to the father, who certainly thought that this share had been transferred, as it was commonly supposed in the family to have been; Mr. and Mrs. Jones must therefore elect between this sum and her legacy.

The Reporter did not hear the argument for the defendant.

Lord Chancellor this day, gave judgment.—He said, the portion could no more be considered an ademption of the legacy, than a satisfaction; as to the question of election, he thought the evidence was not satisfactory to drive Mr. and Mrs. Jones to an election. He thought it not sufficient to enable him to pronounce, that the testator did not mean she should have both the legacy and the £1,800.

(a) The report in *Vesey* contains a great deal of the discussion upon this point.

Therefore

Therefore the plaintiffs *Baugh* and his wife must have the £8,000 and a fraction, given by the will, notwithstanding the advancement of the £5,000 on the marriage; and there being a deficiency, the Master must make an apportionment, and the apportionment, when made, must be paid to the trustees, to the uses of the will; and Mr. and Mrs. *Jones* must retain the £1,800, and also have their apportionment of the legacy.

And this being the common case of a legatee bringing a bill for a legacy, and the difficulty arising upon the testator's meaning, under all the circumstances of the case, the costs must come out of the fund (a).

(a) The report of this case in *Vesey*, is so much more full that the reader will find it unnecessary to give any attention to the present one. As to

the cases upon the subject of satisfaction of portions, vide *Warren v. Warren*, ante, vol. i. 305. and the Editor's note to it.

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DIMMOCH v. ATKINSON.

Lincoln's-Inn
Hall, 17th, 18th
Dec.

THIS was a petition, by the husband, to have part of his wife's fortune, which was in this Court, paid to him.

It appeared that the husband was by trade a glover, and had six children by his wife, who was in Court, and consented.

And although it was strongly opposed by Mr. *Lloyd*, for the trustees in the marriage settlement, yet, the wife persisting, after a long examination, in her consent, the Lord Chancellor, after taking till the next morning to consider of it, made the order (a).

Where a married woman will consent to have part of her fortune (in court) paid to her husband, it must be so.

(a) The report of this case is erroneous, in representing that there was a settlement. It had been previously (as is usual in these cases) referred to the Master, to enquire whether there had been any settlement made on the marriage of the petitioner *Jane*, and by the report it appears, that no settlement had been made. The terms also of the order, recite "that the petitioner *Jane*, not desiring that any settlement or provision should be made on or for her or her issue, &c." Reg. Lib. A. 1790. fol. 31. Where the fund has been settled, the modern

cases cited in the Editor's note to *Frazer v. Baillie*, ante, vol. i. 518. have established, that the Court will not authorize the wife's departing with the fund to any person, though she should consent on her examination; and as appears by *Minet v. Hyde*, ante, vol. ii. 663. and the cases there cited, a positive affidavit is required, that there has been no settlement on the marriage, or at least that the wife's money has not been the object of it. See also upon this subject, *Bourdillon v. Adair*, post, 237.

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Lincoln's Inn
Hall, 18th Dec.

CAMPART v. CAMPART (a).

The Court will not direct money to be paid out to an infant executrix, but will refer it to the Master to enquire whether there are any debts or legacies, and to consider of a maintenance.

A PETITION by a female infant of the age of eighteen, who was executrix of the will of her sister, who had attained twenty-one; (which will the petitioner had proved) stating, the will of *Francis Campart*, the father, whereby the residue of his personal estate was given to the petitioner and her deceased sister, in equal shares, at their respective ages of twenty-one years; and praying that her sister's share of the property which had been paid into Court, might be paid to her as executrix; but the petition did not state that there were any debts, or any particular call for the fund.

A former petition to the same effect, had been presented to the Master of the Rolls, who had refused to order the payment of the money, but referred it to the Master to enquire whether there were any debts or legacies to be paid. Upon which the present petition was presented to the *Lord Chancellor*; and coming on to be heard this day,

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Mr. Mitford, in support of the petition, said—that the petitioner, notwithstanding her infancy, might be plaintiff at law all the rights of her sister, although he apprehended that she could not be guilty of a *deceit* before twenty-one; that therefore he apprehended that she was entitled to have a fund in this Court paid out. That, if there were any debts or legacies to be paid, the Court would order it to be paid out.

Lord Chancellor—doubted, whether, even in that case, he could order it to be paid; but said that the infant was entitled to the same protection with respect to this property as any other; he therefore confirmed his Honour's reference, with the addition of the Master considering of a proper maintenance for the infant (b).

(a) Reg. Lib. A. 1790. fol. 93.

(b) In the case of *Ex parte Sergison*, 4 Ves. 147, the circumstance of an infant being sole executor, was much considered. *Lord Alvanley* there stated, that he had been informed by the judge of the ecclesiastical court, that probate was always granted to an infant, under an idea, that if refused, the Court of *King's Bench* would compel them by a *Mandamus* to grant it; though it did not appear, that any

Mandamus had ever been granted for that purpose. The circumstances of that case, as observed by *Mr. Vesey*, had considerable effect in producing the statute 38 Geo. 3. c. 87. s. 6. & 7. whereby it is enacted, that where an infant is sole executor, administration shall be granted to the guardian, or such person as the spiritual court shall think fit, till the infant is twenty-one, at which time, and not before, probate shall be granted to him.

BURTON

BURTON v. ELLINGTON.

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Lincoln's-Inn
Hall, 16th Jan.
1791.

BILL to open an account for fraud, setting out particular instances of error and fraud in the account. The bill stated that there had been a reference and award, but charged that there would not have been such an award, if papers had been produced which were withheld by the defendant.

Plea of an award and release good to a bill to open an account.

To this bill, the defendant pleaded the award; and the plea also stated a release of the matters contained in the bill.

Lord Chancellor allowed the plea (a).

(a) Mr. Serj. Hill states, that the plea was ordered to stand for an answer, with liberty to except. The Editor has searched the Register's

book, but ineffectually. For the doctrine upon the subject, vide *Halfhide v. Fenning*, ante, vol. ii. 386.

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Ex parte SHAKESHAFT, in the Matter of KEMPSON,
a Bankrupt.

Lincoln's-Inn
Hall, 21st Jan.
1791.

JOHN SHAKESHAFT, by will, left £2,000 three *per cent.* Bank annuities, to his executors after-named, in trust to pay the dividends to *Ann Shakeshaft*, his wife, for life, afterwards to the petitioner *George Shakeshaft*, his son, for life, and after his death, the principal to be equally divided among his children at twenty-one, but if they all died under that age, then to be divided among all the children of his brother *Richard Shakeshaft*; and he appointed *Samuel Kempson*, the bankrupt, and the said *Richard Shakeshaft*, executors.

K. and S. being trustees of money in the funds, sell it for the benefit of S. who dies insolvent, and K. becomes bankrupt: the person interested in the funds may prove against the estate of K. the value of the funds at the bankruptcy, though S.'s estate be first liable.

Soon after his death, viz. in 1782, the two executors joined in selling out this sum of £2,000 three *per cents.* and *Kempson* permitted *Richard Shakeshaft* to take it to his own use, upon giving an undertaking in writing to replace it upon demand: and *Richard Shakeshaft* continued to pay the amount of the dividends upon the stocks sold out, to *Ann*, the widow, till death in 1790, when he died insolvent, and then the transaction of the sale of the stock was discovered.

In December 1790, *Kempson* became a bankrupt.

George Shakeshaft, by his petition, now prayed that he might be at liberty to prove under *Kempson's* commission, on behalf of himself and the other parties interested in the £2,000 Bank annuities, under the will, so much as was the market price of those annuities at the time of the commission, (stocks having risen very considerably between the time that the funds were sold out, and the

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the date of the commission) and that the dividends might be paid by the assignees into the Bank, subject to further order.

This petition was opposed by the assignees of *Kempson*, who insisted, that the petitioner ought first to have recourse to *Richard Shakeshaft's* effects, who had received the money, and applied it to his own use; whereas *Kempson* had never received any benefit from it; but that, if the proof was to be admitted, it should only be for the money produced by the sale of the stock, which was £400 less than what the petitioner prayed to be admitted to prove.

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But *Lord Chancellor* said—that the question between the two estates of *Kempson* and *Richard Shakeshaft*, must be settled hereafter on a bill; but as *Kempson*, who was the surviving executor, had been guilty of a breach of trust, it was very clear that the petitioner, or some one on behalf of the parties interested, ought to prove the debt under the commission, for the sake of securing the fund, until it should be seen to whom it belonged.

And as to the amount of the debt to be proved, it was the common rule in equity, that where a trustee had made use of a trust fund, he might be compelled by the *cestui que trust*, either to replace the fund, or to account for what he made of it, as it should appear most for the benefit of the *cestui que trust*; that therefore the petitioner must be at liberty to prove what it would have cost *Kempson*, at the time of the bankruptcy, to have replaced the stock: and his Lordship directed the assignees to pay the dividends into the Bank, subject to further orders (a).

(a) Vide Co. B. L. 155. 1 Montag. B. L. 619.

Lincoln's-Inn
Hall. Same day.

Ex parte JOHN SHAKESHAFT.

Where the bankrupt and another are executors of a creditor of the bankrupt, the Court will permit the other executor to prove the debt, even though a suit is pending in the Ecclesiastical Court, as to the executorship.

THIS was a petition of *John Shakeshaft*, in the same bankruptcy: it stated that *Kempson* the bankrupt was indebted to *Richard Shakeshaft*, petitioner's father, in his life-time, to the amount of £900 in balance of accounts. That *Richard Shakeshaft*, by his will, had appointed *Kempson* and the petitioner joint executors, but that *Kempson* had entered a *caveat* in the Ecclesiastical Court against the probate of that will, insisting on the inability of the testator to make a will at the date of it, and setting up a former will, by which he, *Kempson*, was sole executor and residuary legatee. This petition prayed that the petitioner might be at liberty to prove this debt under the commission, and that the dividends should be paid into the bank by the assignees, pending the contest in the Ecclesiastical Court, and until further order.

This

This was opposed, on the part of the assignees, on the ground that though in cases where the bankrupt was the executor, the Court would appoint a person, in the nature of a receiver, to prove a debt under the executor's commission, there being no other manner of securing the fund, yet in this case there being no executor, the Ecclesiastical Court will grant administration, *pendente lite*.

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But *Lord Chancellor* made the order in the form prayed (a).

(a) Vide 1 Montag. B. L. 144.

THORNTON v. DIXON (b).

JOSEPH DIXON, *Thomas Horn*, and *James Souter*, in 1761, being seised in fee of some land called *Broadmoor*, entered into partnership for 21 years as paper-makers, and mills were erected upon the land, and they declared the uses of the land to the use of themselves in fee, as tenants in common.

In 1764, they entered into another partnership for 21 years, by deed, taking in four new partners, *Isaac Dixon*, *Jacob Dixon*, *Lancelot Dixon*, and *Joseph Crosthwaites*, in different proportions; and in the partnership deed there was a covenant from the three original partners, to stand seised of the land in trust for the co-partnership, in the proportions in which they were respectively interested therein, and a proviso that in case any of the partners wished to dispose of his and their shares, he or they might do so, giving notice to the other partners, in order that they might have an opportunity of purchasing. That partnership term expired, and they went on afterwards without any new agreement.

During the second partnership they bought a freehold messuage, with a little land adjoining, called *Low Meerbeck*, for the better carrying on the trade which was enjoyed by the partners as joint-tenants.

Joseph Dixon possessed, by purchase from the others, one half of the whole concern, and died leaving a widow, *Barbara*, who was his second wife, a son *Jacob*, and a daughter *Ann*, his children by his former wife.

The son carried on the trade as a partner, and received the profits till his death, and died leaving his sister *Ann* his heir, and she was admitted a partner, and died. The plaintiff, her husband, took out administration to her, and under a settlement made after his marriage, by which, in default of appointment of uses therein mentioned, the estate was limited to himself and his wife in fee,

(b) Reg. Lib. A. 1790. fol. 564. nom. *Thompson v. Dixon*.

Lincoln's-Inn
Hall, 28th Jan.

Though a co-partnership agreement may alter the nature of real estate, yet it must be express so to do.

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he claimed, as survivor, his wife's moiety in *Broadmoor* and *Meerbeck*.

The other partners had refused to pay him the profits of the concern since his wife's death, but submitted to account as the Court should direct.

The defendant *Barbara Dixon*, widow of *Joseph Dixon*, claimed her dower in *Broadmoor*, and her share under the custom of the province of *York*, of the husband's personalty, and also her distributive share under the statute, and defendant *Jonathan*, the heir of *Ann*, claimed her real estate.

It was objected by the partners, defendants, that the settlement, could give no right to the plaintiff in his wife's share, there having been no licence or consent thereto by the other partners, pursuant to the clause in the deed of partnership.

The only question at the hearing, was as to the equitable quality of *Broadmoor* and *Meerbeck*.

28th Jan. 1791.

Lord Chancellor said—he had always understood, that where partners bought lands for the purpose of a partnership concern, it was to be considered as part of the partnership fund; and that, consequently, *Broadmoor* and *Meerbeck* must be considered as personal estate, and distributable as such. And that as the surviving partners were not bound to admit the representatives of a deceased partner, after the expiration of the term, to the partnership, the concern must be sold and divided, and distributed as personalty among the claimants, according to the rules of law.

It was suffered to stand over, for the partners to agree among themselves about selling the concern; and his Lordship gave liberty to argue the nature of the property, if his proposition on that point could not be maintained.

8th March, 1791.

Upon the cause coming on again, *Lord Chancellor* thought, that had the agreement been that the mills should be valued and sold, it would have converted them into personalty of the partnership; but that the agreement in this case was not sufficient to vary the nature of the property: therefore, that after the dissolution the property would result according to its respective nature, the real as real, the personal as personal estate (a).

(a) The doctrine upon this subject has been altered by a very recent decision in the case of *Townsend* and others, executors of *W. Mackintosh* v. *Deraynes* and *I. Mackintosh*, which is reported in the Appendix to Mr. *Montague's* valuable work on Partnership, vol. i. 97. There is also a dictum of *Lord Eldon* in the case of *Selkrig* v. *Daries*, 2 Dow. P. C. 242. in which his Lordship is represented to have stated it as his opinion, that all property involved in a partnership concern, ought to be considered as per-

sonal. The question will probably soon be brought forward again to receive a more solemn adjudication; in the mean time it is well understood to be the opinion of many gentlemen of the first professional eminence, that where real estate has been purchased with partnership property, for the use of the partnership, it becomes personal property, not only as between the members of the partnership respectively, and as between the partnership and creditors, but also as between the representatives of a deceased partner.

The

The cases of *Bell v. Phyn*, 7 Ves. 453, and *Balmain v. Shore*, 9 Ves. 500, which were in a great measure de-

termined upon the authority of the present case, may now therefore be considered as entirely over-ruled.

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HILARY TERM.

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31 GEO. III. 1791.

CLINTON v. HOOPER (a).

S. C.

1 Ves. jun. 173.

BILL by the plaintiff, widow of *William Clinton*, to have her estate exonerated, by the estate of her husband, from a mortgage made by the husband and plaintiff, and for which he received the money.

Where a wife's estate is mortgaged for the benefit of the husband, she has a right to stand as a creditor; but this may be repelled by evidence to shew her intention to the contrary.

Plaintiff, in the year 1746, intermarried with *William Clinton* (who was then in indifferent circumstances), and he received from her father a proper fortune. In the year 1762 she became entitled, upon the death of her brother *William Smith*, intestate, and as his heiress at law, and by the custom, to freehold and copyhold estates, which latter were surrendered by her "to the use of *William Clinton* and *Mary* his wife, their heirs and assigns for ever." Afterwards there being an opportunity of purchasing the estate on which the husband lived, he agreed to purchase the same for £7,600, and, in order to raise the money, he prevailed upon the plaintiff to join in selling some part of her real estate, and in a mortgage of the copyhold which had been so surrendered to the defendant *Deans* for £1,500, which the husband received and applied to the purchase. Her consent to this, was obtained by a promise to settle the estate which was to be purchased, to the same uses to which the plaintiff's estate was settled; but this was never performed. *Clinton* made his will, dated 26th October, 1776, thereby gave an house to the plaintiff for life; and also gave to trustees for her an annuity of £60 a year during her life. He devised the newly-purchased estate to his nephew *William Hooper*. He also gave his ready money and securities for money, to pay his debts and legacies, to the amount of about £1,600, and gave the residue to his nephew *William Hooper*, and appointed the plaintiff and *William Hooper* his executors. The testator afterwards made a codicil to his will dated 11th October, 1776, whereby he revoked a devise in his will of a moiety of a messuage called the *Bank-house*, to his nephew *George White*, and several legacies which were to be payable thereout, and devised the same to plaintiff for

(a) Reg. Lib. A. 1790. fol. 119.

N 2

life,

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life, with remainders over. The testator died 17th October, 1781, and the executors proved the will and possessed the effects, (except the furniture, which was given to plaintiff for life); more than sufficient to pay the testator's debts, including the £1,500 mortgage-money.

Plaintiff filed her bill to have the estate exonerated; to which *Hooper*, the devisee, put in an answer; in which he contested plaintiff's right, on the ground that it was a voluntary gift by the plaintiff to her husband, of the money, in order to enable him to complete the purchase, which had been made at her request. He further stated, that the personal estate of the husband would not be sufficient to pay the debts. He stated receipts for the annuity, and that upon settling some accounts, the matter respecting the mortgage had been fully entered into, and the disagreeable situation of the devisee stated, on account of his paying more than the rent of the estate in annuities; on which occasion the plaintiff had admitted that it was agreed between her and her husband, that the £1,500 should be paid out of the estate charged therewith; and that she had agreed to sell the same for that purpose; but that since his death she had been advised to claim the £1,500 from his assets, but had relinquished that idea, and did not desire it, and promised to discharge the same, and accept the provision made for her by her husband's will, and requested the defendant to pay the legacies given under the will, and pressed him to sell the estate for that purpose; and the plaintiff paid the mortgagee the interest of the £1,500.

The defendant *Hooper* dying after he had put in his answer, the bill was revived against his executors.

Mr. *Mansfield*, for the plaintiff, insisted—that this case was within the general rule, that where the wife's inheritance is mortgaged for the debt of the husband, she shall be a creditor upon the husband's assets to the amount; and that in this case, the previous surrender had made no difference, but the estate still continued to be the inheritance of the wife.

Mr. *Solicitor-General*, Mr. *Lloyd*, and Mr. *Richards*, for the defendants, contended—that under the circumstances of this case the bill ought to be dismissed. They admitted the general rule, that where the husband and wife borrow money, on the security of the wife's estate, although her estate is by law, first liable, yet in a court of equity, it ought to be disincumbered by the assets of the husband; but that this was a right that might be repelled by circumstances. That in this case the estate was not the estate of the wife; there had been a surrender to the husband and wife; under which surrender, though other persons would have taken as joint-tenants, a husband and wife took by entireties. That, in fact, the husband borrowed upon his own estate. That, suppose it the

the estate of the wife, she had agreed to its being made liable; which was a gift to the husband. If they had sold the estate, the money would have belonged to the husband; and they would have sold it if they could have found a purchaser. She has shewn by her own act, that she meant it to be a gift. It is not necessary to prove an agreement between husband and wife for such a purpose, that it should be in writing. There is a case in Cowper (*Goodright v. Straphan*, Cowp. 201.) where a lease being made by husband and wife, the wife having received rent after the death of the husband, was presumed to have re-executed the lease. Here she has relinquished the claim, and has permitted the executor to go on borrowing money to pay the husband's debts. In *Lewis v. Nangle*, Amb. 150. 2 Cox's P. W. 664. note; the Court would not decree the wife's estate to be indemnified. It should be referred to the Master, whether it is to be considered as a loan or a bounty. *Parteriche v. Powlet*, 2 Atk. 383.

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Mr. Mansfield, in reply.—The question is, whether there is any thing in the present case to take it out of the rule, which is established in *Tate v. Austin*, 1 P. W. 264, and supported by *Lewis v. Nangle*; that where a woman pledges her estate for her husband, she shall be a creditor for the money. There is no case that any agreement, or any thing short of what appears in the deed, shall prevent her from being a creditor. The rule was not applied in *Lewis v. Nangle*, because the debt was originally the debt of the wife. The case in the Court of King's Bench, (*Goodright v. Straphan*) has always been doubted, and is directly contrary to a case of *Drybutter v. Bartholomew*, 2 P. W. 127, and the only case mentioned in Cowper to support the rule, is a mistaken application of *Perkins*, 154. *Parteriche v. Powlet* is not applicable to the present case. There is no case in the books where it is put upon an agreement with the husband. If there ever was a case where the wife ought not to be bound, it is this; it is in proof that the husband received £4,000 by the sale of the other part of the wife's estate, and that the husband promised to settle the new-purchased estate upon her. For two or three years she paid the interest: but if she had not, the mortgagee would have taken his annuity and turned her out of possession; so that the payment of the interest can have little weight in shewing her intention. And the conversation amounts to nothing like an agreement to waive the advantage she had from her estate being only mortgaged. At the time of that conversation the legacies were paid, so that the conversation did not induce the executor to pay them. Nothing short of an explicit agreement ought to preclude her from her right.

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Lord Chancellor.—There is no doubt of the existence of the rule; but the question is, whether it is more than an inference to be

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be drawn from the transaction that the wife means to be repaid. If so, the consequence will be, that it may be rebutted by parol evidence, to shew that the wife meant her estate to be liable. I had a doubt at first as to the admissibility of parol evidence: but it seems to have been Lord *Hardwicke's* idea that the case was the same as between principal and surety; in which case the conversation would be admissible. In this case the conversation was very strong. It is important to lay down the rule in such a manner that it will apply to other cases. I thought the rule was, that the wife had a right to stand in the place of the creditor; but if the evidence in this case is believed, Mrs. *Clinton's* demand must stand after the legacies.

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The cause stood over, and coming on again in this term, Mr. *Solicitor-General*, Mr. *Lloyd*, and Mr. *Richards*, for the defendants, again argued—that this case was not within the general rule; that the plaintiff did not stand in the light of a wife who has suffered her husband to borrow money on the security of her estate; that this was indeed originally the estate of the wife, but was afterwards settled to the use of herself and her husband, as tenants in fee. At the time of the mortgage, the husband was extremely anxious to have the estate sold, with a view of applying the purchase-money in part payment of the value of the other estate he was then about buying; but instead of selling the estate, it was agreed that it should be mortgaged for £1,500 to be applied to that purpose. That it was a clear inference from this circumstance, that she meant to make him a present of this money. The same was also clearly the intent on the part of the husband; by his will he has given her an annuity of £60 a year, payable out of the estate purchased, charged his real estate with all his debts, except debts by mortgage, which shews he did not mean she should receive both provisions; because the expressions of his will cannot be satisfied if this mortgage money is paid to her; and such a claim as this may be rebutted by shewing the intention of the parties. After the death of the testator, she distrained for an arrear of the annuity, and an account was settled of what was due to her on that claim; and there is proof in the cause of her declarations to the executor, that he might pay the debts and legacies. That she certainly was at liberty to waive her demand, and cannot now be at liberty to call for re-payment of the money.

2d. That parol evidence of her declarations is admissible.—This is evidence to rebut a presumption or an equity. It does not contradict any instrument, or affect any property in the will, the deed binds the estate of the wife in point of law, but the rule in equity limits that right, and sees how the money has been applied. In the case of debtor and surety, it is necessary to shew

who is the surety and who the debtor. Proof may be given for the purpose of shewing that it was not the intention of the husband to be considered merely as such, but as the principal debtor; it may be so between strangers, so it may between husband and wife, that he shall not be considered as the surety only. The Court has always examined as to the application of the money, and where there is no evidence of a gift from the wife to the husband, the wife is deemed the surety, and the husband the principal debtor, and his estate must pay the debt; but where the money has been applied for the benefit of both, the Court has said the rule did not apply.

This was the case in *Lewis v. Nangle*, Ambl. 150, which established that wherever the husband has applied the money to his use, his estate must be liable; but that circumstances of presumption, and proof of such presumption, arising even subsequent to the borrowing of the money, will take it out of that rule, *Earl of Kinnoul v. Money*, which was a rehearing before Lord Camden, on the 21st March, 1767 (a). In 1740, Miss Earnle, afterwards Lady Duplin, wife of Lord Duplin, son of the Earl of Kinnoul, seised in fee of estates of the value of £800 *per annum* session, and of other estates in reversion, expectant on the death of her mother, charged with debts, upon her marriage with Lord Duplin, covenanted to settle her estates in trust to the following uses, viz. To raise a term of 1000 years for payment of debts for younger children, then in trust for her husband as long as he should live; remainder to herself for life; remainder to uses which never took effect; remainder to herself in tail male; remainder to such uses as she should direct; remainder to herself in fee. There was no issue of the marriage except one child, who died in its infancy, and Lady Duplin created a debt of £1,000 on her estates by mortgage, in which Lord Duplin joined; and Lord Duplin covenanted to pay the money so secured. In 1746, £4,500 was borrowed on the security of the estates; and £2,500 having accrued due for interest on both sums, the mortgage was assigned over, and the estates pledged for the whole sum of £8,000 principal and interest, being the principal sums and interest due on the mortgage. Lady Duplin made her will, and charged her reversi-ble estate with the payment of her debts and legacies, and directed them to be paid by sale or mortgage of her estates; and as to the same, devised her estates to Lord Duplin (after-

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There are two very good reports of this case in Serjt. Hill's MSS. It was originally before Lord Hardwicke, and not before Lord North, as erroneously stated above. It is called by the name of *Lord Duplin v. Money*, 5 MSS. 597. Lord Hardwicke stated the general rule, (which Lord Camden afterwards declared to be as the Court itself) that where a husband borrows money on the security

of the wife's estate, as the money is under his power it is supposed to come to his use; and this turns the proof on him to shew the contrary. This Court *prima facie* considers it as a pledge for the husband's debts. And his estate shall be applied to exonerate it unless a special case is made. The case is reported as it afterwards came on upon the rehearing, by the name of *Earl of Kinnoul v. Money*, 11 MSS. 141.

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wards Earl of Kinnoul) for life, with power to make leases, then to two persons for their lives, and after the decease of the survivor of them, to the defendant *Money*, in fee. Lady *Duplin* died in 1758 without issue. The bill was filed to have the £8,000 paid out of these estates; and it came on before Lord *Northington*, who referred it to the Master for the purpose of enquiring into the appropriation of these sums so raised by mortgage, and reserved the consideration till the Master should have made his report. The question was between the devisees and heir at law, whether her estates were to be considered as well charged with these sums. It came on before Lord *Camden*, when the point respecting the evidence of the appropriation was again raised, and his Lordship being of opinion that Lord *Northington*, by sending it to the Master, had decided that point, refused to hear the cause in that shape; and it came on afterwards upon a re-hearing, Lord *Camden* observed, that the Earl of *Kinnoul*, (who was the devisee) had filed the bill for the sale of so much of the estates as would pay off the debts and incumbrances, as well those of the plaintiff as those of the mother. The £2,500 was borrowed as the debt of the mother. It was plain the £4,500, except a small part of it, had been applied by Lord *Kinnoul* to his own use, and the £1,000 for interest. Lady *Duplin* had expressly devised her estates in possession, charged *with her debts*, and the estates in reversion, subject to the incumbrances: that where husband and wife raised money upon the wife's estate, this Court would inquire into the use of it, and, *quoad* the transaction, dissolve the marriage: that though the husband might afterwards give his bond, the application of the money determined who should be deemed the *surety* and who the *principal*; and in equity it was to be considered that the surety came in aid of the principal debtor. That it was so in *Lord Huntingdon's case*, 2 Vern. 437. *Tate v. Austin*, ibid. 689. 1 P. W. 264. and in *Pocock v. Lee*, 2 Vern. 604. That there was no case exactly in point except *Lewis v. Nangle*, and that was a particular case, and no authority to govern other cases, unless circumstances were exactly similar; the money there was raised, not merely to pay the husband's debts. His Lordship said, he could see no reason why the master should not make the enquiry; if otherwise, it would destroy the fundamental rule of distinction between principal and surety. As to the next question, Whether Lady *Duplin's* will made any alteration by the words *subject to debts and incumbrances*: these words infer no intention as to the equity between husband and wife, but merely as to the mortgagees; they must mean every incumbrance the wife was liable to. He must therefore say she intended to lay the debt upon the estates in possession. From this decision it appears, that if she had declared expressly in her will that she meant it to be a burthen upon her estate, that must have made the trustees the principal debtors, and not the sureties. If that intention cannot be made manifest without

without evidence, what objection can there be to parol evidence? It is nothing more than to repel the presumption of the wife's coming into Court to have her estate exonerated, upon the idea that the husband was the principal and original debtor; but if she was a mere stranger, then she would be the principal and not the surety, and in such case her intention to make it her debt would have turned the scale, and as such evidence must have been admitted as between strangers, why not as between husband and wife? Evidence of the application of the money may surely be as well determined in equity as at law, where parol evidence must be admitted, as the fact could not be got at without it. It would be against conscience that the husband should apply money so raised for the use of the wife, and that afterwards his estate should be liable, because evidence of that fact cannot be admitted, and so it would in the case of a gift from the wife to the husband.

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Lord Chancellor observed—that in the case of *Lord Kinnoul v. Money*, the wife had a power of making a will; and the question was, whether by her will she had not made the estates liable.

Mr. Mansfield and *Mr. Mitford*, for the defendants.—This is a copyhold mortgage, and to be deemed a written instrument, consisting of the surrender in consideration of money to be paid to the husband. It is the contract of the husband, and any parol proof of the intention of the wife to contradict such contract, and to throw the debt on her estate, must be rejected, unless it is admitted upon the ground of fraud or mistake. Her declarations during her coverture cannot be read, and those since her husband's death amount to nothing more than to authorize the executor to pay debts and legacies, but no implication of her intention to exonerate the husband's estate. If there had been any misrepresentation on her part, or any wilful act of her's to mislead the executor, and then to call upon him for the debt, that might have constituted a case of fraud, and up to that extent, parol declarations might have been admitted; but simply as such, for beyond that extent she would have been bound.

Lewis v. Nangle, and *Lord Kinnoul v. Money*, do not afford any inference as to the present case; as to the idea of principal and surety, there cannot be a presumption of the promise of a gift, both parties being jointly bound: where, therefore, the husband has executed the bond, and received the money, the presumption is at an end, and the wife must have a right.

Lord Chancellor.—The equity does not consist entirely in the inference of the money being borrowed of the wife, and therefore being the debt of the husband, but with reference to its application; so that if the question were whether evidence should be received to shew that the money was used for the benefit of the wife or

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or her relations, it must be admitted; but the point here is whether parol evidence can be admitted to prove, that, at the time of the money being raised, it was the intention of the wife that it should pass from her to the husband in the shape of a gift, for the purpose of buying other estates. It is here impossible to shew that circumstance without resorting to parol evidence; and if it is to be rejected upon such slender grounds as the cases have gone upon, it would be impossible to administer justice upon these occasions with any effect; therefore I must admit it.

The evidence was read, and consisted of the answer of *William Hooper* the executor, since deceased, by which he swore that in a conversation after the husband's decease, the plaintiff said "that since her husband's decease she had been advised to claim the said £1,500 from his assets, but that she had relinquished that idea, and did not now desire it, and promised to discharge the same herself, and accept the proviso made for her by her husband's will, or to that effect; and requested the defendant to pay all the legacies under her late husband's will, and pressed him much to sell the estates charged with the legacies, to raise money for that purpose:"—And

The deposition of *William Harris*, which stated, that in a conversation between them, the plaintiff told the deponent and *Thomas Hooper*, that Mr. *Aston Harris* advised her that she was entitled to have the £1,500 and interest due on the mortgage, paid off from her husband's assets, but she did not mean to claim it, and hoped her cousin *William Hooper* would go on paying the legacies.

Mr. *Mansfield* commented upon the evidence, and observed—that it amounted to little more than common conversation; and as to what passed before the death of the husband, mere parol declarations of a married woman could not amount to a waiver so as to do away her right; it says, that the estate should be for his benefit; but does she stipulate for any provision for herself out of it? But that part of the evidence is obviated by observing, that the estate never was sold, but only mortgaged, and the security still remains. There must be indisputable proof of a woman's barring herself of such a right, which is not a presumptive right, but as much an equitable one as any other arising in this Court. The disclaimer after the husband's death amounts to nothing: had it been intended as a fraud upon the executor, or if the executor upon the faith of her never calling for this debt, had paid debts and legacies, it might have amounted to something, but the evidence here goes by no means to that extent.

Lord Chancellor.—Suppose the heir at law was to declare to the executor that he would not press him for payment of the debt, and upon that assurance the executor was to proceed in payment

payment of the legacies, such *parol* declarations would be sufficient to bar the heir from coming into this Court for payment of the debt, and my opinion is, that the case of the wife is *in toto* the case of the heir.

As to the right of the wife upon consideration of all the cases on this head.—The earliest case is 1 Vern. 41. *Reason v. Sacheverel*, which amounts to this, that the wife's land was the security, and the husband having joined in mortgaging the estate for £400 paid off a part of the principal, and borrowed of the mortgagee the like sum, the Court held the wife's estate was liable to pay the whole. In giving that opinion, no point arose how far the assets of the husband should have exonerated the estate, but the effect of it seems to have been, that from the moment the wife mortgaged the estate, it was in the power of the husband, independent of that mortgage, to charge it with a further sum, and the case there is, that *she* having charged the estate with £400 originally, and that sum having been paid off, and another borrowed upon the same security, it was held not to be the *immediate debt of the husband*, and no case has yet been decided, that where the husband and wife join in mortgaging, the husband shall by his own interposition charge his estate. In the case of *Grey v. Kentish*, 1 Atk. 280. the question was, whether a possibility of the wife could be assigned by the husband as a security for his debt, and the point was between the assignees of a bankrupt and his wife. Lord *Hardwicke*, in considering the nature of the right of the husband, observed, that if the husband had paid off the debt, it would have been the wife's by survivorship, being in the nature of a pledge, and had he died without paying it off, she would have been entitled to have had the estate disencumbered. The rule is this, that the title of the wife to be exonerated, is precisely the same with that of the heir. In 1 P. W. 264. and 2 Vern. 689. *Tate v. Austin*, though it was not the question in the cause, and consequently the judgment of the Court did not appear to have been weighed in argument, yet the Court declared that, clearly, the wife could not insist upon being paid against onerous creditors, but would be postponed to such creditors, and that the debt being originally the debt of the husband, his personal assets were bound to pay it in the first instance, and she entitled to have her estate so exonerated, not upon any right she might have, but upon the idea of its being the husband's debt; and such is the reasoning in 1 P. W. 347. *Bagot v. Oughton*, where the wife's estate was mortgaged before marriage, and the husband, subsequent to it, joined in a fine for confirming the title, there the Court held that as it was not the husband's debt originally, his assets were not liable; that he should not be bound by his covenant, which was subsequent to the debt, and not to be deemed an *absolute* covenant, but merely collateral to the debt which existed before, and consequently remained in *statu quo*. So

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Evelyn v. Evelyn, 2 P. W. 659. which seems to have determined the point between heirs and executors. How was it then in *Lewis v. Nangle* (which is but confusedly taken) and *Lord Kinnoul v. Money*? The former case seems to be more clearly reported in Mr. Joddrell's notes, and the question seems to have turned upon the circumstance of the money having been borrowed at the time the settlement was made, and Lord Hardwicke thought that it was part of the contract made with the wife, that it applied to the mortgage, and that he could in that case make no distinction between the one contract and the other. *Lord Kinnoul v. Money*, which was said to be like *Lewis v. Nangle*, was in that respect different, for there Lady Duplin had a real estate subject to charges to a certain extent, and the estates of the mother were also subject to several demands. The agreement to mortgage that estate for £2,000, made it the debt of the ancestor particularly charged upon the estate; and when it was settled in strict settlement, after several limitations, and the terms which expired then by there being no issue living, she had a power to appoint during her coverture. Some time after the marriage, a sum of money was raised for the benefit of Lord Kinnoul (then Lord Duplin) and there being a sum of £1,000 due with interest thereon, at length the estate was mortgaged for the sum so borrowed, which, together with the original mortgage debt, made up £8,000, and in the mortgage deed it was expressed to be done by virtue of the power. Upon the enquiry directed by Lord Northington, before the Master, it turned out to have been applied to the use of the husband. In 1767, upon the re-hearing before Lord Camden, it was contended that the reference to the Master was wrong, and that there ought to have been an immediate decree, and the whole charged upon the estate of the wife, the bill having been brought by Lord Kinnoul to have the estate sold; but that could not be done without the consent of the other parties, Lord Camden affirmed the decree *in omnibus*, and argued that Lord Northington's opinion was right, for that the wife's estate should not be subject to any other charge than her own debt; that *Lewis v. Nangle* turned upon different circumstances, for the distinction there consisted in its being a debt upon a previous consideration, and went upon that peculiarity, and not upon general principles. This affirmation of Lord Northington's decree furnishes a position not directly in point in that case, but which ought to have been raised, that it is not necessary it should appear upon the face of the deed to lead the uses of the fine, that the debt was the debt of the wife, but may be proved to be so *aliunde*. So in *Bagot v. Oughton*; for it is clear that the instrument was not a declaration to that effect. In *Lord Kinnoul v. Money*, it appears that the money was, as to part of the sum raised, in fact for payment of the debt of the wife, and that it never was the debt of the husband; for if it ever had been so, he would

would have been bound to pay it out of his personal assets, but the circumstance of his covenant to pay the debt, it not being his own, could not make it his, because such covenant might be otherwise explained as being merely a further security, without altering the quality of the debt itself; and the true reason is in *Evelyn v. Evelyn*, for there the husband covenanted for a debt contracted by another party, and his covenant was not deemed as binding his own estate, or making it his personal debt. If in *Lord Kinnoul v. Money*, parol evidence might be given to shew that the debt which the husband covenanted to pay was not his own debt, but the debt of another, and, consequently, that the husband should not be charged with that debt; if it were *res integra*, it might be thought a right thing to say, that where the wife, upon the face of the transaction, appears to have subjected her estate to the debt of the husband, there should be an inference in favour of the wife, that on the part of the husband it was a contract also to make her a *feme sole*, for the purpose of coming into equity for the payment of it. As to Lord Camden's observation that the marriage was dissolved, *quoad* the transaction, that perhaps is merely figurative, as I know of no case to that extent, and the cases of *Tate v. Austin*, *Lewis v. Nangle*, and *Lord Kinnoul v. Money*, go upon the idea of an equitable *assumpsit*. Where it has been clearly proved that the money borrowed had been paid into the hands of the wife, and that she had been perfect mistress, and had converted it to her own use as her separate money, there can be no reason why the Court should not declare that it was so applied, and consequently could not be deemed the debt of the husband, and the covenant of the husband was merely a necessary covenant for the purpose of confirming the debt. So where the wife, having the absolute disposal of it, appropriates it to the use of her husband, that fact would reach the original contract, but still resolves itself into the same principle as before, and makes her estate liable. Now as to admitting parol evidence, I confess, in giving my opinion before as to the admissibility of parol evidence, it was too extensively given: the case as it is stated, without parol evidence to the contrary, is the case of a wife having subjected her estate to the debt of her husband, by joining in a mortgage of her estate. The allegation is the same as in *Tate v. Austin*, that it was meant as a gift; but there it was a vain allegation, and not allowed. If so it stands thus, that she suffered a sum of money to be raised upon her estate: if this had been by fine, and a trust declared to raise £1,500 by sale or mortgage for the benefit of the husband, it would have been manifestly *never* the debt of the husband, but a sum of money which, by the terms of the contract, he was entitled to, and so much raised out of the inheritance of the estate. But where it is alleged to be a transaction, purporting (not only upon the terms of the instrument, but by other evidence) to raise a sum of money for

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for payment of his debts, was it possible to give parol evidence applicable to the transaction itself, so as to prove that it was for a different purpose, and must have a different effect from that which the instrument purported, as that the wife's debts had been paid by it, and the application had been different from what was in the original contemplation of the parties, such parol declarations must be admitted to that extent; and there could be no reason for rejecting it: but when I thought that the evidence offered in this case, of the conversation prior to the husband's death, ought to be admitted, I went beyond the cases, for all the authorities are, where the fact has been established of the money being actually paid to another account, and consequently considered as never borrowed by the husband, because never received by him. But to say evidence should be admitted to shew the wife's consent, that the money should be his, as attempted here, would be carrying the rule of evidence too far: and if it stood upon that case, the wife ought to have the estate exonerated out of the personal assets of her husband. But I cannot distinguish this case from the case of the heir, for if the heir will tell the executor to pay the legacies, and that he will not press him for the exoneration of his estate, and the executor pays upon that assurance, the executor shall not be called upon afterwards, or the legatees be obliged to refund. It would be contrary to the rules of equity to say, that the heir should not be barred, by such a concession, from his claim; it would be countenancing, as it were, a mere fraud upon the executor, if the heir was allowed to call upon him after such a disclaimer. In this case she has, by her declarations to the executor, clearly disclaimed her right, and I do not think it material whether the legatees were paid before or after this concession; therefore the bill must be (a)

Dismissed (b).

(a) The present case was much cited and relied upon in two recent cases, (*Innes v. Jackson*, 16 Ves. 356. and *Ruscomb v. Hare*, 6 Dow. P. C. 1.) in which an equity was established in some measure analogous to the present, viz. that where husband and wife mortgage the wife's estate, and the equity of redemption is reserved to the husband and his heirs, without

recital or special circumstance to shew the intention to make a new settlement of the estate, the husband has the equity of redemption, as he before had the legal estate, only *jure uxoris*.

(b) As against the executors of the mortgagees with costs, as against the other defendants without costs, Reg. Lib.

SEAL

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SEAL v. BROWNTON (a).

BILL filed by the heir at law against the devisee, for an account of rents and profits.

An issue *devisavit vel non*, had been directed at the hearing.

Upon the trial a verdict was given for the defendant.

Upon the cause coming on for further directions, the heir not appearing, the only question was as to costs.

Bill of heir at law, against devisee, where vexatious, dismissed with costs.

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Mr. *Mansfield* said—the rule was, that where an heir was made defendant he must have his costs; but where he is plaintiff, and files a long bill to harass the devisee, he shall pay costs.

Lord Chancellor dismissed the plaintiff's bill with costs (b).

(a) Reg. Lib. A. 1790. fol. 80. *nom. Seal v. Braunston*.

(b) So in *Luxton v. Stephens*, 3 P. W. 373. it was said, that where an heir at law is plaintiff, and miscarries in his suit, he shall not have costs, but on his suit appearing to be groundless shall pay costs. And in general where the heir comes into equity instead of bringing an ejectment, (though it is discretionary in the Court,) costs will be given against him, *Leman v. Alie*, Amb. 163. *Blinkhorne v. Feast*, 1 Dick. 153. *Johnson v. Gardiner*, ib. 313. *Gough v. Botevel*, ib. 396. *Beaumont v. Whiton*, cit. ib. But where he is brought into Court as a defendant, if it be to a bill by a devisor to perpetuate testimony, he shall have his costs notwithstanding his having cross-examined the plaintiff's witnesses, *Bidulph v. Bidulph*, 2 P. W. 285. *Angell v. Brown*, cit. ib. *Luxton v. Stephens*, sup. *Humphrey v. Morse*, 2 Atk. 408. *Webb v. Claverden*, ib. 424. *Blinkhorne v. Feast*, sup.

But if he examine witnesses to counter the will, he shall not have his costs, *Berney v. Eyre*, 3 Atk. 386. *Blinkhorne v. Feast*, sup. This is where the bill does not pray relief, or is not brought to a hearing. If it is, and he chooses to examine witnesses, the question of costs will depend upon the circumstances, *Gough v. Botevel*, sup. *Blinkhorne v. Feast*, sup. *White v. Wilson*, 13 Ves. 91. He has also a right to demand an issue upon which he shall have his costs. *Berney v. Eyre*, sup. *White v. Wilson*, sup. unless he sets up insanity, or any other disability against the person who made the will, and fails, in which case he shall not have his costs, ib. *Webb v. Claverden*, sup. But it must be a very strong case to induce the Court to give costs against him, as spoliation or secreting the will, *Berney v. Eyre*, sup. vide also *The Attorney-General v. The Haberdashers Company*, post, vol. iv. 178.

ARMSTRONG v. ELDRIDGE.

THE testator gave the residue of his real and personal estate to trustees, in trust to sell and apply the interest, proceeds and profits thereof, from time to time, to the use of his grand-children,

Testator gave a residue to trustees to pay the interest to four persons for life, and

after decease of the survivor, then to divide the principal among their children; two died; the interest shall be paid to the other two.

Though the words "share and share alike," in a will, generally create a tenancy in common, they cannot do so where there is an express joint-tenancy.

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Frances Armstrong, Charlotte Armstrong, Rebecca Armstrong and Mary Armstrong, equally between them, share and alike, for and during their several and respective natural and from and immediately after the decease of the survivor of in trust to pay and apply the principal money, to and among and every the children of his said grand-daughters, equally divided between them, share and share alike.

Two of the grand-daughters were now dead, leaving children. The question was, What should become of the interest which the two deceased grand-daughters took, until the death of the survivor. The children of the deceased grand-children claimed their mothers being tenants in common, therefore, there being survivorship.

But, *Lord Chancellor* said—That though the words, “equally” “to be divided,” and, “share and share alike,” were, in general construed, in a will, to create a tenancy in common: yet, in the context shews a joint-tenancy to be intended, the words should be construed accordingly; and that, in this case, it was evident that the interest was to be divided among four, while four were alive; among three, while three were alive; and nothing was to go to the children, while any one of their mothers was living. He declared the whole interest to belong to the two living grand-daughters, by survivorship (a).

(a) So in *Scott v. Bargeman*, 2 P. W. 68. where there was a legacy to three daughters equally, and if all died before their legacies were payable, then the whole to their mother, two of the daughters having died before their shares became due, the surviving daughter was held entitled to the whole. And it is a general rule of construction, that where an interest

in the nature of a tenancy in common is given, yet if the legacy is given upon the death of all those persons, though no intention is expressed the death of one or two only, survivorship shall prevail, *Bayard v. Baynton*, 14 Ves. 474. As to the words to create a joint-tenancy, vide *1 v. Baynton*, ante, vol. i. 118.

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Ex parte CATOR, in the Matter of WHITESIDE, a Bankrupt.

Charging a bankrupt in execution after the commission, is an election to proceed at law; and the creditor cannot afterwards proceed under the commission.

PETITION to be at liberty to prove a debt, the proof of which had been refused by the commissioners; the ground of refusal was, that the bankrupt had been charged in execution after the bankruptcy, and after he had obtained his certificate; the debt was therefore discharged.

It was argued by Mr. *Solicitor-General* and Mr. *Mitford*, although a creditor having a debtor in execution before the bankruptcy, will not prevent him from proving; yet, that charging

In execution after the commission, is such an election as the creditor must abide by; in law, he has been paid. A party cannot proceed against the goods; after the body is discharged by process of law. If a debtor dies in execution, the creditor may proceed against the goods; but that was in consequence of 21 Ja. 1. c. 4. so that it seems to require a positive act of parliament. It is a particular indulgence to permit a creditor to prove, when he has the bankrupt in execution, before the commission; and that on the ground, that the law has taken from the bankrupt all his effects, with which he could pay the debt, to which the creditor probably looked; but after the commission, the creditor must know that there was nothing to choose between but the body and the commission.

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Lord Chancellor.—I really think the taking in execution after the commission, is an election not to come in under the commission; and, having made this election, the creditor must abide by all the consequences of the certificate. He may assent to, or dissent from, the certificate, in order to assist that legal remedy, but still he cannot receive any benefit from the commission.

The cause stood over, and coming on again—

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Mr. Mansfield cited a case *Ex parte Hichlin*, 2d Feb. 1785, where the creditor having taken the bankrupt in execution, after the commission, and having discharged him, still was not suffered to prove his debt, having taken the highest satisfaction the law knows. But at the same time, he contended it was reasonable, that whether he had taken him before or after the commission, he might still be at liberty to make an election to take a dividend; that commencing an action is not an election; and if commencing is not so, why should proceeding be considered as such?

Lord Chancellor said—the right way was for the creditor to apply for leave to prove, in order to assent to, or dissent from, the certificate. If the creditor has lost his debt by a blunder, it is a pity, but he has made his election.

The bankrupt was discharged out of custody by compromise (a).

(a) See the case of *Ex parte Warden*, ante, 191, which arose out of the same

bankruptcy where all the subsequent cases are collected.

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Rolls, Feb. 1st.

HEATHCOTE v. MAINWARING.

A real composition cannot be established without shewing the deed by which it was created, or proving its existence.

IN this case it was stated by Mr. Lloyd, and admitted counsel for the defendant, that in the cases of *Robert Appleton*, and in *Hawes v. Swain*, Exchequer sittings after 1789 (a), it was settled, that a real composition could not be established without shewing the deed by which it was created, or proving the actual existence of such deed; for otherwise every *modus* would be set up as a real composition; and there would be no line drawn between them. And the Master of the Rolls said this to be so (b).

(a) These two cases are in Wood's *Tithe Causes*, vol. iv. p. 10 and 315.

(b) The doctrine upon this subject was very ably stated in the elaborate arguments of the majority of the judges, who delivered their opinions in the House of Lords, in the case of *Knight v. Halsey*, 2 B. & P. 206. et seq. It seems to have been invariably holden, that some evidence must be adduced to shew that such an agreement, though lost, did once exist, vide the passage from the Year Book, 34 H. 6. 36. there cited. *Rotheram v. Fanshaw*, 3 Atk. 698. *Bennet v. Neale*, Wightw. 324. *Chatfield v. Fryer*, 1 Price, 253. Therefore in the case of *Sawbridge v. Benson*, 2 Anstr. 37. where instruments

were given in evidence, which denoted that such an agreement had taken place, as they related to any other, the real composition was supported; vide also the opinion of Eyre, C. J. in *Bolton v. The City of Carlisle*, 2 H. Bl. 263.

The doctrine upon the subject of exemption from payment of tithes is similar to the above, is contained in the luminous judgment of Lord Mansfield in *Fanshaw v. Rotheram*, from his Lordship's MSS. 1 Ed. The subsequent decisions which are numerous, are collected in the note to it.

GREEN v. LOWES (a).

Injunction against purchaser in behalf of creditor to restrain payment to heir.

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BILL by creditors against the executor, heir, and purchaser of a real estate, charged for payment of debts.

Mr. Stanley moved for an injunction on the purchaser of the estate, which had descended on the heir, to restrain him from paying the purchase-money to the heir.

There was an affidavit, that there was little, if any, other property for payment of the debts, besides this estate.

The defendant had not answered, but had obtained order for time.

Injunction ordered, till answer or further order (b).

(a) Reg. Lib. A. 1790. fol. 145.

(b) In the same way a purchaser would probably be restrained from paying the purchase-money to a devisee, though it was not till the case of *Mathews v. Jones*, 2 Anst. 506. that it was established, that the statute of fraudulent devises had placed the heir

and devisee in exactly the same situation; making them personally liable, after alienation of the estate, if they still held it; and discharging bona fide purchasers under the same all liability, vide Sugd. Vend. & 435.

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ATKINSON v. LEONARD (a).

MOTION to discharge a writ of *ne exeat regno*, obtained against the defendant. The affidavit made by the plaintiff, upon which the writ was obtained, stated that the plaintiff, who lived in *Antigua*, had formed an intimacy with the defendant, who then lived in the same island; that, in the year 1765, the defendant being embarrassed in his circumstances, the plaintiff had assisted him by paying off some debts, and becoming security for others, and continued so to do till the year 1768; when other creditors of the defendant, to whom he had given bonds, with warrants of attorney to confess judgment thereon, becoming pressing for their demands, and having entered up their judgments, the plaintiff made out, and furnished the defendant with an account of monies by him advanced and paid for the defendant; requesting him to give the plaintiff a bond and warrant of attorney to confess judgment, to put him on the same footing with the other creditors; and the defendant, in the month of *May* 1768, accordingly gave the plaintiff his bond and warrant of attorney, for securing to the plaintiff the balance due to him on the said account, with interest at *£6 per cent.* which balance, to the best of the plaintiff's recollection and belief, amounted to *£800* current money of *Antigua*, equal to *£450* sterling. The affidavit farther stated, that in the year 1766, a treaty of marriage took place between the plaintiff and his wife, the defendant's sister, and a treaty with the defendant's father, for that purpose, who promised to enter into a bond, for securing *£600* as part of the daughter's portion; that the plaintiff came from *Dominica* to *England*, leaving his wife and her mother in the care of his house; and, in the plaintiff's absence, the defendant made a visit to plaintiff's wife; that, soon after the plaintiff's return to *Dominica*, and wanting money, he found it necessary to press the defendant for the money secured by the bond and warrant of attorney; that, on searching his bureau, where he used to keep the said bond and warrant of attorney, he discovered that they, together with other papers, had been taken away, and he had never since been able to find the same; that the father of the defendant, and plaintiff's wife, dying in *January* 1783, intestate, leaving defendant and plaintiff's wife, his only children, and his widow, surviving him, his next of kin, and entitled to his personal estate; and the widow soon after dying, and leaving the defendant and plaintiff's wife her next of kin, and the father dying possessed of about *£1,950* currency, equal to about *£1,100* sterling, and the mother being possessed of about *£550* sterling, the plaintiff claimed, in right of his wife, one moiety of those sums. The

Writ of *ne exeat regno* obtained by one inhabitant of *Antigua*, against another, upon a bond stated in the bill to be lost, discharged with giving security to abide by the decree.

Writ of *ne exeat* must be upon an equitable demand.

Though a court of law will permit a plaintiff to declare upon a lost bond, that does not oust the concurrent jurisdiction of this court.

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(a) Reg. Lib. A. 1790. fol. 222.

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affidavit further stated, that, about *June* 1789, the defendant's wife being in a bad state of health, the defendant, together with his wife, came to *England* for medical advice, and arrived in *England* in *July* following, and the plaintiff following him, arrived in *England* soon after him; and, upon various applications to the defendant, having been able only to obtain the payment of £10 on account of his demands, and the defendant *intending shortly to return to Tortola*; the plaintiff had filed his bill for the recovery of his demands. "Saith, that there is now justly due and owing, from the said defendant to this deponent, upon, or by virtue of the said bond and warrant of attorney, the sum of £900 sterling; and he verily believes, that upon the taking the account of the estates of the defendant's father and mother, possessed by defendant, there would appear to be due to plaintiff and his wife, for their distributive share, £550 besides interest;" and the plaintiff further said, that he was in *Tortola* when the defendant came to *England*, and understood that his whole business was to attend his wife for advice, who died in *November* last, and the defendant intended to return (about *Christmas* last) to *Tortola*; and that if the defendant was permitted to leave the kingdom, without giving security to answer plaintiff's demands, he verily believed he should be in great danger of losing the same. When this application was made to *Lord Chancellor*, for a writ of *ne exeat regno* against the defendant, his Lordship thought that the plaintiff had laid a sufficient ground for the writ, with respect to the money lent and advanced for the plaintiff, but not to the extent of his demand in right of his wife, to a moiety of the personal estate of the defendant's father and mother; and therefore by his order of the 29th *November* 1790, directed the writ to be marked for £900.

Upon this writ the defendant was arrested, and gave bail; and put in his answer to the plaintiff's bill, admitting the execution of the bond and warrant of attorney, but stating claims upon the plaintiff; and, in particular, denying that any thing was due to him in right of his wife, from the estate of defendant's father and mother; they not having left sufficient property to discharge their debts.

Mr. Solicitor-General, supported by *Mr. Mansfield* and *Mr. Steele*, now moved, that the writ of *ne exeat regno* might be discharged, and the defendant discharged out of custody.

'They argued this on several grounds; First it was a writ of *ne exeat regno*, to restrain a man from returning to his own country, from whence he came with the plaintiff's knowledge, and for a legal purpose, the having proper medical advice for his wife, not for the purpose of avoiding process; and the bill was only filed when the defendant was just going home, though the plaintiff had been a considerable length of time in this country. This was originally

originally a prerogative process, and has been only extended to the subject in cases where the defendant was leaving the kingdom for the purpose of avoiding the process of the Court. *Pract. Reg.* 251. That cannot be the case where the party is going home to the same country, which is the country of the plaintiff, where all the accounts are, and where the same justice may be had as here. In *Robertson v. Wilkie*, Amb. 177. the case is not stated, but it appears to be a writ to restrain the defendant from returning to *Minorca*; and the reason why Lord *Hurdwicke* ordered security to be given, was, that there was no faith between the parties, as to having justice where they resided, as there is between persons living in the *English* colonies. Lord *Northington* refused a writ of *ne exeat* on this very ground. Secondly, This is a mere legal debt, for which the plaintiff might hold the defendant to bail; and therefore is not entitled to this process, which must be upon a debt of merely an equitable nature. 2 Atk. 210. Then what is the nature of this demand? The plaintiff does not swear positively to one shilling being due. It is only, that he had been used to advance money for the defendant, and had given security for his debts: that he desired him to give him a security equal to that he had given his other creditors; and that the defendant gave him a bond and warrant of attorney to confess judgment for the balance, which amounted to £800 currency, equal to about £400, to the plaintiff's *recollection and belief*. If the security required by this warrant, be in analogy to bail, this manner of swearing would not be sufficient to hold a defendant to bail; the sum must be positively sworn to. The plaintiff says, afterwards, that there is now £900 due to him; which, standing by itself, is positive; but is here manifestly founded on the balance; so that it is impossible the plaintiff can be positive as to his debt, and cannot make that sort of affidavit which is necessary, to restrain the defendant from going home. If £900 is due, it is a legal debt: but the bond and warrant of attorney, being money to secure a balance, does not alter the nature of the original debt. Not like a bond for a certain sum, which shews the nature of the contract. The defendant swears, in his answer, it was only for the balance. But it will be objected, that the bond and warrant of attorney being lost, makes it an equitable demand. Notwithstanding this, the defendant might have been held to bail. In *Reed v. Brookman*, 3 T. R. 151. A deed of release was pleaded as lost, and allowed.

Mr. *Le Mesurier* as *amicus curiæ*, stated a case of *Totty v. Nesbit*, in B. R. Trin. 24 Geo. 3. (cited 3 T. R. 153. note.) where an action was brought on a bond as an existing instrument, and *profert* made: the defendant prayed *oyer*: *Peckham* moved for the plaintiff to dispense with the *oyer*, on account of the original bond being lost, upon giving a copy of it; Justice *Buller* said,

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said; that they might have declared on the bond as lost; and the Court gave the plaintiff * leave to alter the declaration.

Mr. Lloyd and Mr. King, for the plaintiff.—No body can read the affidavit without being satisfied of the money being due: the defendant admits giving the bond, but only says, generally, that there is not so large a balance due. We admit that, in order to authorise the issuing of this process, the demand must be an equitable demand; that the affidavits must be positive, and the persons proper objects of the application. 1st. With respect to its being an equitable demand: whenever a man has lost his bond, he may come for a remedy into a court of equity; no action has ever been supported on a lost bond. If there are any declarations of that sort, they are not those of the whole Court. In the case in the Term Reports, Justice Grose differed; that case was a distress for a rent-charge, to which a release was pleaded, which had been lost, and it was so pleaded for the sake of the Court's presuming the release, where the rent-charge had not been demanded for a great length of time.—In *Whitfield v. Fausset*, 1 Ves. 387. Lord Hardwicke says, the loss of a deed is not always a ground to come into a court of equity, but if a man has lost a bond, he is entitled to come into a court of equity, because he cannot declare without making *profert*, the defendant being entitled to *oyer*; and he cited several cases which are mentioned at the end of the report. So *Walmsley v. Child*, 1 Ves. 341. As no cases are cited to the contrary, your Lordship will not say this is a legal demand. As to the affidavit being positive, it has been laid down, that where the demand was for an account, and the plaintiffs swore that *they verily believed* a certain sum was due, the writ has issued; the plaintiffs were the next of kin of a testator.—Mr. Solicitor-General has said, that the defendant had come here for a particular purpose, and no application till he was just setting off upon his return. The affidavit states, that demands had been made in the *West Indies*. The defendant came hither in 1788, his wife died in 1789, yet he continues to stay here. It is not sufficient to say, that both the plaintiff and defendant lived in the islands. The case in *Ambler* does not state the circumstances; but does not apply to this case, it did not proceed on the ground of the parties being abroad. In a case of *Collingridge v. Monk*, in 1766, the defendant was usually resident in *Jamaica*, and only occasionally resident here, yet the writ was granted. If I lend money to a man on his bond, he is my debtor wherever he goes. It is said, it is hard to make him account here, but there is no doubt the account must go on; the only question is, whether we shall have a security to obey the decree when made.

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* The bond had been destroyed by the defendant.

Mr.

Mr. Solicitor-General, in reply.—The very case determined in the Court of King's Bench, is put by Lord *Hardwicke* in the case cited. Consider what sort of equality would be put between the plaintiff and defendant by the doctrine now held. The defendant might plead a release, lost by time and accident, but the plaintiff, who had lost his bond, could have no benefit. In the case mentioned, of *Totty v. Nesbit*, it was a bond declared upon, with a *profert*; the declaration was afterwards amended, and, upon the trial, the loss of the bond was proved, and a notarial copy produced, upon which the plaintiff recovered. Therefore the plaintiff has a remedy at law, and, in such case, the Court will not usually grant a writ of *ne exeat*. This is not a writ sued out of course; a case must always be established for it. The defendant, by his answer, swears positively that the plaintiff, on the balance of accounts, was indebted to him. No account is given for the delay in filing the bill; although the plaintiff has stated that he came hither to enforce his demand against the defendant. There are courts of judicature in the islands, where the papers and other evidences are, which are competent to decide between the parties.

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Lord Chancellor.—The real question is, whether there is a sufficient equitable demand to sustain this equitable process.—I should be sorry a process should depend on so precarious circumstances as those stated. The case in *Ambler* did not go to the length now urged; the Court thought he must give security to the extent of the demand. Lord *Hardwicke* is there made to take a difference between the *English* law, as administered at *Gibraltar*, and the *Spanish* law at *Minorca*. In both cases justice would be equally certain. Lord *Northington* thought the process ought not to be extended to foreigners; that could only apply where the justice of the case would be equally certain to be done (a). When the question is only between a *ne exeat regno*, and taking security, I easily lean to the latter; because, beyond securing the demand, I think there is no reason for the *ne exeat*. The justice of the Court being satisfied, I think it would be better to abandon the process, than to apply it where the purpose can be answered by giving security; it should be used only to compel the party to abide by the justice of the case.

(a) The question how far the Court will interfere between foreigners was discussed in two subsequent cases, but has not been judicially determined. *De Carriere v. De Calonne*, 4 Ves. 577. *Roddam v. Hetherington*, 5 Ves. 91. In the former of these cases Lord *Rosslyn* remarked upon the extreme delicacy of interfering, as against foreigners, whose occasions or misfortunes have brought them here. Lord

Eldon has more than once noticed the extreme hardship of the present case. Cases somewhat similar have also occurred, in which captains of *East India* vessels, or persons having appointments abroad, have been restrained by this writ. *Etches v. Lance*, 7 Ves. 417. *Tomlinson v. Harrison*, 8 Ves. 32. *Dick v. Swinton*, 1 Ves. & Bea. 371. *Stewart v. Graham*, 19 Ves. 313.

I shall

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I shall not contradict the case in the King's Bench (*Totty v. Nesbit*) being law; but the question is, whether this Court is ousted of its jurisdiction, so that a demurrer would lie to a bill, for a lost bond, and it must be dismissed: I thought there had not been any such way of declaring, but there must be a *profert*; but, as it is, there must be proof of the bond's having had existence and being lost (*a*). But it does not follow, because the court of law will give relief, that this Court loses the concurrent jurisdiction which it has always had: and till the law is clear upon the subject, the Court would not do justice in refusing to entertain the jurisdiction (*b*).

Therefore the writ must be discharged, on giving such security (*c*) as the Master shall think proper, to pay what shall be found due upon the account (*d*).

(*a*) In *Read v. Brookman*, cit. ante, p. 221. it was decided for the first time, that a *profert* of a non existent grant might be dispensed with, on a bare averment that it was lost and destroyed by time and accident. Before that determination, the excepted cases were the *profert* of a deed in another court, *Wymark's case*, 5 Co. 74 b, 75 a. the possession of it by the opposite party, 3 T. R. 151. and what was more doubtful, the destruction of it by fire, *Dr. Leyfield's case*, 10 Co. 92 b. 93 a. *Dampier's Argument*, 10 East, 57. But if the deed be declared upon with a *profert*, nothing can dispense with the production of it. *Smith v. Woodward*, 4 East, 585. Though, where alleged to be lost, it may be given in evidence, if, having been lost at the time of pleading, it be found before trial. *Hawley v. Peacock*, 2 Campb. 557. But the *profert* will not be dispensed with where the date of the deed and names of the parties are unknown. *Heady v. Stephenson*, 10 East, 55.

(*b*) Mr. Car, in a valuable note to *Duane's case*, 1 P. W. 262. notices the two exceptions to the rule, that this writ shall not issue for a mere legal demand, for which the defendant might have been holden to bail, viz. 1st, at the instance of a wife suing in the spiritual court for alimony; as to which, vide *Shaftoe v. Shaftoe*, 7 Ves. 171. *Dawson v. Dawson*, ib. 173. *Oldham v. Oldham*, ib. 416. *Haffey v. Haffey*, 14 Ves. 261. Mr. Beames's Brief View, 30, &c. et seq. and 2dly, in matters where the courts of law and equity have a concurrent jurisdiction; as to which, vide *Russell v. Ashby*, 5 Ves. 96. *Jones v. Sampson*, 8 Ves. 593. *Hannay v. McEntire*, 11 Ves. 55. *Jones v. Alephsin*, 16 Ves. 471. also Mr. Beames's Treatise, cit. sup.

(*c*) To the extent of £2,500, if so much should ultimately be found due. (Reg. Lib.)

(*d*) As to the affidavits necessary to obtain this writ, vide *Shearman v. Shearman*, post, 370.

Rolls, 7th Feb.

BRIDGE v. ABBOT (*e*).

Bequest of residue to certain persons, and if they should die in the life-time

of the testatrix, to their legal representatives.—One died, his next of kin shall take the share of the residue, not his executor beneficially, or his residuary legatees.

MARY KING made her last will and testament, and some codicils thereto, and by a second codicil to her will, dated 14th May, 1782, taking notice of the death of her cousin Stephen

(*e*) Reg. Lib. A. 1790. fol. 253,

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Abbot the elder, whom by her will she had appointed executor, and that by the death of said *Stephen Abbot*, the residue of her estate remained undisposed of, she gave and bequeathed all the residue and remainder of her personal estate and effects unto the defendant *Abbot*, six other persons (not parties) and the testator *John Webb* deceased, equally to be divided between them, share and share alike, and she directed, that in case of the death of any of them (the said residuary legatees) before her, then the share or shares of him, her, or them, so dying before her, should go to, be had, and received by his or her legal representatives, and appointed the said defendant *Abbot*, and *John Webb*, executors of her will.

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John Webb died the 14th *February*, 1788, in the life-time of the testatrix, possessed of a considerable personal estate, and having made his will, dated 10th *January*, 1786, whereby he gave several legacies to the plaintiffs and defendants, and appointed the defendants *Abbot* and *Stonard* executors, leaving the plaintiffs, and some of the defendants, his residuary legatees. Soon after the death of *John Webb*, on the 24th *March*, 1788, the testatrix *Mary King* died, and upon settling the account of her property, £2,235. 19s. was paid, by the surviving executor of *Mary King*, to the executor of *John Webb*, as his share of the residue of her estate.

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The plaintiffs claimed, and filed their bill for this property, as next of kin of *John Webb*, insisting, that it not being such a vested interest, at the time of making his will, or at his death, as he could dispose of by will (the testatrix being then alive) it must be considered as part of his personal estate undisposed of by his will, and concerning which he was to be considered as having died intestate, and that they were therefore entitled thereto.

The defendants, the executors of *John Webb*, claimed the residuary part of the testator's estate, in that capacity, and the residuary legatees claimed the same as part of the personal estate of *John Webb*.

The case had been argued this term, and this day his Honor gave judgment to the following effect:

Master of the Rolls.—There is nothing more clear than that a testator may, if he thinks fit, prevent a legacy from lapsing. It is necessary, according to *Sibley v. Cook*, (3 Atk. 572.) not only that he should declare that the legacy should not lapse, but likewise who should take in the stead of the residuary legatee.

I cannot suppose that the testatrix meant, by the substitution, that any person who claimed under the will of the residuary legatee should take; nor could she intend, that any persons who should

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casually represent *John Webb* as executors, who might be different persons, one representing him here, another abroad, one in the province of *Canterbury*, another in the province of *York*, should take; she could not mean, that the person who might be entitled to the probate of the will, should take this beneficially.

The executors being out of the case, the next thing is, whether she could intend that it should be given in such a manner, that *John Webb* should dispose of it. She might have done this by giving it to such persons as *John Webb* should appoint. If she had given it thus, all the persons who had claims under his will, and their representatives, if they died before *Mary King*, must take, which is absurd to suppose.

I am of opinion, that the true construction is, that by *legal representatives*, she meant such persons as could claim *John Webb's* property in their own right; which would be his next of kin.

What does *John Webb* dispose of by his will? his own estate; he does not affect to dispose of what might come from the will of a living person.

It so happens, that there may be a special residue, as there was in the *Attorney-General v. Johnson*, Ambl. 577, where the question was, whether by *residue* was meant all that should lapse; and it was held, that he did not intend the lapsed legacy to pass. The case of *Davers v. Dewes*, 3 P. W. 40. was there referred to.

It is absurd to suppose he meant every thing to pass which might arise by fresh acquisition. Is it impossible he could intend to pass what might come under this will? Although it is argued, that persons by these residuary devises often convey estates of which they were not consensant; yet suppose he had children, and after giving something to each, had given the residue to one; *non constat*, he meant the same in case of a great acquisition. Then it is not probable he meant these persons to take by the description of *legal representatives*.

It is true, that by *legal-representatives*, in the Court of Chancery, we generally mean the persons in whom the estate legally vests. But these may be several persons, according to the situation of the property, one person in the province of *York*, another in the province of *Canterbury*.

There is another sense in which the words, *legal representatives*, may be understood; viz. the persons entitled beneficially to the property. It is true, in the statute of distributions, the words *legal representatives*, are not used for next of kin, nor for executors or administrators, but for the testator's children, or their children only, or the *descendants* of the next of kin: the statute means persons substituted in the place of others deceased.

I think I impute a more probable sense to the words, than either the executor or residuary legatee of *John Webb*.

Then

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Then another question may be made, whether they are to be the representatives at the death of *John Webb*, or *Mary King*, and if they be different persons, there must be an enquiry as to that: I think they cannot be the legal representatives at his death, for then the shares would be lapsed before they vested; but at the death of *Mary King*, for she meant it to go to persons alive at her decease. She meant such persons as, at the time of her decease, would be entitled to *John Webb's* property, if he had survived her, or died intestate.

This seems the most rational construction, and liable to the fewest absurdities; for the share of the residue was not intended to be assets of *John Webb*.

The case of *Sibley v. Cook* will, I think, hardly prove much; it was given to executors. I think if that had been the word used in this case, there might have been considerable doubt, the person taking could not claim under *John Webb*, his executor might have been an executor in trust: I think therefore she meant his next of kin at her death.

It might have been that some of them had died between his death and hers: as none died there will need no enquiry.

I must therefore declare the persons entitled as legal representatives, to be the persons who would have been entitled as next of kin to *John Webb*, at the death of *Mary King* (a).

(a) The extension of a devise or legacy to heirs or executors will not prevent the devise or legacy lapsing, per Sir W. Grant, *Smith v. Pybus*, 9 Ves. 576. The former point has been decided from the time of *Brett v. Rigden*, Plowd. 340, confirmed in *Goodright v. Wright*, 1 P. W. 397, where see the subsequent cases. The doctrine as to legacies was entered into at large in *Elliot v. Dagenport*, 1 P. W. 83, where it was agreed that where a legatee dies in the life of the testator, though the executors are named, yet the legacy is lost, but that a will might be so penned, as that the executor of the legatee should have the legacy, but then it ought to appear in the will plainly and by direct words, that this was the testator's intention. *Sibley v. Cook*, 3 Atk. 572. *Sibthorp v. Moxom*, ib. 580. *Maybank v. Brook*, ante, vol. i. 84. *Hutcheson v. Hammond*, ante, 128. *Corbyn v. French*, 4 Ves. 418. *Toplis v. Baker*, 2 Cox, 121. In the case of *Evans v. Charles*, 1 Anst. 128, where there was a bequest to certain persons or their personal representatives, the Court of Exchequer held an adminis-

tratrix of one of those persons to be entitled against the claims of the next of kin and the residuary legatee. The Court endeavoured to differ that case from the present, but the distinction between the two cases cannot be considered as completely satisfactory. In *Long v. Blackhall*, 3 Ves. 486, a limitation in case of lapse to the legal representatives of the testator, was established in favour of the next of kin. Lord Rosslyn was there of opinion that both the determinations in the present case, and *Evans v. Charles*, were perfectly right, shewing that the words are to be explained according to the subject-matter.

Where a legacy is given to a person, who dies in the life-time of the testator, but the legacy is given over, the death of the person to whom the legacy is immediately given, will not interrupt the intended bounty of the testator. *Miller v. Warren*, 2 Vern. 207. *Darrel v. Molesworth*, ib. 378. *Perkins v. Micklethwaite*, 1 P. W. 274, and the cases there cited. *Northey v. Strange*, ib. 343. *Willing v. Baine*, 3 P. W. 113. Vide also *Rheeder v. Ower*, post, 240.

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COLLET v. WOLLASTON.

Rolls. Same day.
An insolvent debtor is not a necessary party to a bill by a purchaser of his interest in stock, against his assignee. But if it has been sold for an apparently under price, the Court will enquire into the real value, previous to decreeing a specific performance.

THE plaintiff was purchaser, at an auction, of the reversionary interest of two sums of £2,000, *South-sea* stock, and £1,200 *New South-sea* annuities, subject to the life interest of *Thomas Mulcaster*, an insolvent debtor of the age of 45 years, which were standing in the names of trustees in his marriage settlement, and subject to the uses thereof, at the price of £320 for the said £2,000, *South-sea* stock, and £215, for the said £1,200 *New South-sea* annuities, and now filed his bill against the assignee of the said insolvent debtor, and the trustees in the marriage settlement, for an assignment and transfer of the same into the names of new trustees, for the benefit of such of the defendants as were entitled to the dividends during the life of the insolvent debtor, and for the benefit of the plaintiff, after his decease.

One of the questions was, whether *Thomas Mulcaster*, the insolvent debtor, ought to have been made a party to the bill, which he was not. And his Honour this day declared his opinion, that he was not a necessary party (a); but the reversionary interests seeming to have been sold for a very low price, said he would direct an enquiry into their value before he decreed a specific performance of the purchase.

(a) As to parties vide the references to *Sherrit v. Birch*, next case but one.

Rolls, 8th Feb.

STOKES v. M'KERRAL.

Issue ordered to discover a witness's interest.

IN this case a witness had been examined. It became afterwards suspicious that he was interested, either personally or as a trustee. His Honour ordered an issue, in order that, upon his examination in the court of law, questions might be put to him to discover his interest; though he said he thought the Court might order an interrogatory to be exhibited to him, in the nature of a *voir dire* (a).

(a) It had been laid down by Lord *Hardwicke*, that the Court would not allow a commission to examine as to the competency of a witness after publication, but would grant one as to the credit of such witness, *Callaghan v. Rochfort*, 3 Atk. 643. The subject was much considered by Lord *Eldon*, in *Purcell v. Macnamara*, 8 Ves. 324. where the rule was laid down, that in general cases the cause is heard upon evidence given before publication, but that you may examine after publication, provided you examine to credit only; and do not go to matters in

issue in the cause, or in contradiction to them, on pretence of examining to credit only, *Wood v. Hammerton*, 9 Ves. 145. *Carlos v. Brook*, 10 Ves. 49. In *Vaughan v. Worrall*, 2 Mad. Rep. 322. a defendant was allowed, after the examination of witnesses, but before publication, to have a commission to examine witnesses as to the fact whether witnesses examined by the plaintiff were interested or not in the suit. But whether before or after publication, such examination can only be by order upon special application with notice, *Mill v. Mill*, 12 Ves. 406.

SHERRIT

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SHERRIT v. BIRCH.

Rolls. *Same day,*

Parties.

BILL as to a moiety of a residue; the other moiety was given to *A.* (one of the defendants) for life, and, upon her decease, to such persons as she should appoint, and, in default of appointment, to certain other persons.

Upon the opening, Mr. *Richards* objected that these persons were not brought before the Court.

And although the interest was upon such a remote contingency, his Honour thought they must be made parties; and the cause stood for that purpose, the plaintiffs paying the costs of the day to the defendants (*a*).

(*a*) Upon the subject of parties, vide *Cullen v. The Duke of Queensberry*, ante, vol. i. 103. and the cases cited in the Editor's note, *Moffatt v. Farquharson*, ante, vol. ii. 338. *Parsons v. Neville*, post, 365.

CHAPMAN v. GIBSON (*a*).

Rolls, 10th Feb.

THE testator devised "all his estate whatsoever and wheresoever, and of what nature or kind soever," to his wife.

He had only copyhold estate; his heirs at law were a nephew and niece, who took no provision under the will, but were otherwise provided for. The estate was not surrendered.

The bill was by the wife against the heir at law, praying a surrender of the estate.

Several cases were cited: but as the arguments made use of by the counsel were repeated by his Honour in his judgment, it is not necessary to state them here.

His Honour gave judgment this day.—

Master of the Rolls.—Though I have not found any case where a distant heir at law has been compelled to make a surrender for the wife, yet I shall not forbear to make the precedent, if I can find a principle. I have looked at all the cases I can, to find on what principle this Court goes in supplying a defect, and altering the legal right; it is this.—Whenever a man having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shews an intention to execute such power, the Court will operate upon the conscience of the heir, to make him perfect this intention. This is an intelligible principle. Very early, where the testator shewed an intention to provide for debts, this Court would supply the defect against the heir. This is not to be con-

Surrender supplied for a wife against a distant heir not provided for by the testator, though provided for aliunde.

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(*a*) Reg. Lib. A. 1790. fol. 513.

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founded with the case of the heir's being disinherited by wills not duly executed; there is no will at all; the Court cannot see that there is such an instrument: but wherever there is such a power, it has been executed. The next class of cases are those where there is a natural obligation. Formerly some judges have thought otherwise; but it is now settled that the Court will not enquire into the *quantum* of the provision. It is sufficient, that the testator is acting in discharge of moral or natural obligations; and it is very difficult for the Court to enter into such an enquiry: the father must be the best judge. The question has been whether this is to be done, so as to put a younger child in a better condition than an elder. Now, I take it to be settled, that this is no objection. The father is the judge as to the *quantum* of the provision. But still there remains a case, which I admit has been determined, whether wisely or not I do not say, *viz.* That the heir at law is not to be compelled to supply the surrender, if he is totally unprovided for; at first the word "disinherited," was used in this subject; but I take this not to be so; and this Lord *Hardwicke* says, for it is of no consequence whether the provision comes from the father or not. Now, on what principle can the Court have made this exception? It is attended with difficulties to know when the son shall be said to be unprovided for. The principle must be this, that the testator being under an obligation to do an act, we will compel the heir to perfect it; but we will not compel him to fulfil an obligation at the expence of another; and if the testator has totally forgot to make any provision for his eldest son, this shall be an answer to the claim of the wife, or other children. If this be the principle, it remains to be decided whether it can be applied to any person but a child. This idea struck Sir *Thomas Sewell*, in *Brooke v. Gurney*, though that case is not a decision of it. Upon the several cases, the principle may be collected (and satisfactorily I think, except as to the exception of an eldest son provided for) *Hardham v. Roberts*, in 1682, 1 Vern. 132. *Bradley v. Bradley*, 2 Vern. 163. In *Bath v. Montague*, 3 Ch. Ca. 106. Lord *Holt* says, that was a power, under hand and seal, to charge the estate with provision for younger children; he made a reversion for the benefit of younger children, not exactly pursuant to the power. "This was held good in equity." I think the execution of a power, and a surrender of a copyhold, go hand in hand, precisely on the same ground. He recognizes the principle, that it depended on being the case of a natural obligation: on account of which the Court would interpose. *Kettle v. Townsend*, 1 Salk. 187. where it is said, "not to be material whether the son is before provided for; for the father is the best judge whether the son is sufficiently provided for or not." And in *Freestone v. Raul*, mentioned in the note to *Watts v. Bullas*, 1 P. W. 61: (for which I looked into the Register's book) the same thing was done. Now, as to a grand-child, I cannot see why he should not have

have the same equity; for the statute of *Elizabeth* has made it compulsory on a grandfather to provide for him. However, it will be for the Court to determine this matter when the case comes before it. *Watts v. Bullas*, 1 P. W. 60. shews that a brother of half blood is not within the case; but that is not material to this point. In *Tollet v. Tollet*, 2 P. W. 489. a defective execution of a power was supplied for a wife. In **Ross v. Ross*, 1 Eq. Ab. 124. the surrender was not supplied, because the devise was satisfied by the freehold; that was the ground of the determination; the reason therefore afterwards given, as to disinheriting the brother, was not material. *Cook v. Arnham*, Cases temp. Talbot, 33, the only doubt there was, whether the rule would extend to reversionary interests. *Andrews v. Wall*, 6 Vin. 237. the surrender was supplied. *Hawkins v. Leigh*, 1 Atk. 387. that case does not determine the point, for Lord *Hardwicke* thought the will did not pass copyhold; but there is Lord *Hardwicke's* opinion, that the word "*disinherison*" is not the proper word; but the question is, whether the heir is unprovided for. I have looked into the Register's book, for *Taylor v. Taylor*, reported 1 Atk. 386. and find it rather more in point than as it stands in the book. There two-thirds of the copyhold were given to the wife, though the book does not state it. The fact was, the father purchased in the son's name; the father continued in possession. On the father's death the son took possession, made a will, and died. The copyhold descended on his heir at law. It does not appear that any real estate descended on the second son. The bill was brought against the defendant as heir at law of his brother the second son; the eldest son insisted, that if the second son took the copyhold as an advancement, it should be brought into hotchpot. Lord *Hardwicke* directed the surrender to be supplied: so that here is a case of supplying a surrender against the heir, who took nothing from the second brother. *Smith v. Baker*, 1 Atk. 385. compares the rule to an heir in blood, and no other distinction there made; but surely the right question must be, Whether there is any obligation to provide: for otherwise why should it not be applied for the *hæres factus*? *Hervey v. Hervey*, 1 Atk. 561. shews, that one branch of a family shall not be provided for by the ruin of another. *Macey v. Sharmur*, 1 Atk. 389. Surrender supplied. *Roome v. Roome*, 3 Atk. 181.—*Goodwyn v. Goodwyn*, 1 Ves. 226.—*Tudor v. Ansen*, 2 Ves. 382.—These are all the cases reported on the subject. There has been another case mentioned of *Brooke v. Gurney*; but neither of the points in that case affect this. The same question arose there, but was not necessary to be determined. Sir *Thomas Sewell* had considered the point, and thought it of great weight. The case turned on the words of the will, which were, "all my lands whatsoever and wheresoever, and of

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* The proper name of this case is *Boss v. Boss*, and it is so cited, 6 Vin. 238.

what

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what nature, kind, or quality soever, to my wife." The wife acquiesced, from 1763 to 1779. She sold freehold estate in 1763. Sir Thomas Sewell determined on the acquiescence, and thought the words of the will sufficient. On appeal to Lord Thurlow, he thought the acquiescence did not bar, but that the words were not sufficient. Now, in this case, is the argument that the heir is unprovided for, an answer to the equity? He cannot be said to be unprovided for, when the father is alive. However, I think this is not material, for, according to the cases, a wife has a right, where there is not an equal moral obligation violated by giving her relief. On the whole, upon principles and cases, I think the wife is entitled to have the surrender supplied (a).

Decree an injunction to restrain proceedings, a surrender when of age, and day to shew cause (b).

(a) The doctrine laid down by Lord Alvanley, in the present case, as to supplying a surrender for the wife, when the heir was unprovided for, called forth the dissent of Lord Rosslyn, in *Hills v. Downton*, 5 Ves. 557. It was agreed by both of them, that upon the later decisions it was immaterial how ample or how scanty the provision for the wife might be; and it was also in effect, admitted by Lord Alvanley, in the present case, that a collateral heir, whether provided or unprovided for, has no right to resist the wife's equity. The difference therefore of opinion between those learned judges (as observed by Sir William Grant, in *Fielding v. Winwood*, 16 Ves. 92.) is reduced merely to this, whether a surrender is to be supplied for the wife against an heir unprovided for, *when that heir is the son of the devisor*. Lord Alvanley, in some valuable observations written by himself, upon the case of *Hills v. Downton*, which are published by Mr. Sugden, in the Appendix to his *Treatise on Powers*, 672, appears, notwithstanding that case, to have retained his former opinion, observing, that if the case of a son wholly unprovided for, were to come before him, he should hesitate notwithstanding the great authority of the Lord Chancellor, to make a decree against him. The line of argument adopted by Lord Alvanley, is so convincing and satisfactory, that it is probable that whenever the Court has to decide between

the two conflicting opinions, his will be adopted. The ground upon which the Court proceeds, is, that where the will expresses an intention to do that which legally and morally the testator ought to do, so simple a form as supplying the want of a surrender, shall not impede the performance of that duty. Hence the heir will be compelled to make good the disposition, if made in discharge of the moral or natural obligation of his ancestor to creditors, wife, and children. But still, as Lord Alvanley observed, that had not been done, (and as it is submitted consistent with reason and principle cannot be done,) where the heir being a son could shew, that if he was compelled to make that surrender, the consequence would be, (he being a son wholly unprovided for) that he would be compelled to fulfil the intentions of his father in discharge of a moral or natural obligation in favour of a widow, or of his brothers and sisters, where it was manifest, that he had neglected to *discharge the natural obligation he was under of providing for him his eldest son*. It appears by the inquiry directed in the case of *Rogers v. Marshall*, 17 Ves. 297. that Sir William Grant inclined to Lord Alvanley's opinion. See upon this subject, Sugden on Powers, 347. et seq. *Lindopp v. Eborall*, ante, 188.

(b) Costs to the defendants, (Reg. Lib.)

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(a) LEACROFT v. MAYNARD.

THE testator gave several legacies by his will, which he directed to be raised out of his real estate; and, among others, a legacy of £1,000 to the hospital in the county of L—, and specifically bequeathed his personal estate. The legacy was, of course, void, by the statute of Mortmain. But the testator, by a codicil, revoked this legacy of £1,000 to the hospital in the county of L—, and, “instead thereof,” he gave the sum of £500 to the hospital in the county of N—, without mentioning any particular fund out of which the same was to be paid. By the same codicil, he revoked several other legacies, and, “instead thereof,” gave smaller legacies to the same legatees, without mentioning any fund out of which the same were to be paid.

S. C.
1 Ves. jun. 279.
Lincoln's Inn
Hall, March 4th.
Testator gives by will a legacy to a charity, void by stat. of Mortmain; by codicil he gives a less legacy “instead thereof,” to a different charity, this shall be held to be charged on the same fund, and therefore void also.

On behalf of the hospital of the county of N—, Mr. *Attorney-General* contended that the legacy, being given generally by the codicil, must be payable out of the personal estate; and that it might be reasonably supposed, that, after making his will, the testator was apprised of the invalidity of the charitable bequests charged on his real estate, and therefore revoked them; and bequeathed other legacies, generally, out of his personal estate.

But *Lord Chancellor* said—he thought, that the codicil only meant to alter the *quantum* of the legacies in some cases, and the objects of them in others, but not the fund out of which they were to be paid; and that, therefore, the legacy to the hospital in the county of N— was void (b) (c).

(a) There were two bills filed in this case, an account of which is given in Mr. *Vesey's* report. The causes are entered in the Register's book, *Pearson v. Leacroft*, and *Leacroft v. Pearson*, Reg. Lib. B. 1790. fol. 402.

same conditions, *Crowder v. Clowes*, 2 Ves. jun. 449. So where a legacy given by will was directed to be exempted from the legacy duty, a legacy substituted by a codicil, was also considered as exempted, *Cooper v. Day*, 3 Meriv. 156.

(b) A legacy substituted for or added to another, shall be raised out of the same fund, and subject to the

(c) Costs given out of the respective estates.

MARGERUM v. SANDIFORD.

Rolls, Feb. 17,
March 17.

THIS was a petition to have a solicitor's bill taxed. The bill was, partly for business done in this Court, and part for levying fines and for conveyancing, but in the latter the petitioner was interested jointly with three or four other persons; and the petitioner was charged with his share only of that. The objection was, that the conveyancing business was not an object of taxation under the act of parliament.

Where any part of a solicitor's bill relates to business done in this Court, the whole may be taxed, although part of the business was for other persons jointly with the person applying.

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MARGERUM
v.
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For the petition, a note in *Douglas*, 199. was relied upon, to shew, that if business had been done, for which the bill might be taxed, the charges for conveyancing business might be taxed also; though it was not so where the bill was for conveyancing only.

His Honor was of that opinion; but said, that here the conveyancing business was for four or five persons, and could not be mixed with a bill for business done in Court for the petitioner only.

To this it was answered, that as the petitioner was charged with his proportion only, which he submitted to pay, it made no difference: for the other parties would not be bound by this reference.

It stood over, that his Honor might speak to the judges of the Court of King's Bench.

And his Honor, on a subsequent day, said, that having consulted them, he found, that their rule was to order the whole of a solicitor's bill to be taxed, when any part of it concerned business done in that Court; and it made no difference where part of it was done for several other persons, as well as the party who applied. His Honor, therefore, made an order for the taxation of the whole bill (a) (b).

(a) Reg. Lib. B. 1790. fol. 233.

(b) This subject was much discussed in the case of *Hill v. Humphreys*, 2 B. & P. 343. Vide also *Ex parte Williams*, 4 T. R. 124. *Winter v. Payne*, 6 T. R. 645. *Mowbray v. Fleming*, 11 East,

285. *Benton v. Garcia*, 3 Esp. N. P. C. 149. *Crowder v. Shee*, 1 Campb. N. P. C. 437. 2 Hullock on Costs, 502. et seq. Vide also *Hazard v. Lane*, 3 Meriv. 290.

Lincoln's-Inn
Hall, 21st March.

Gift of a residue,
to be divided
among persons re-
lated to the tes-
tator, confined to
relations within
the stat. of Dis-
tribution.

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RAYNER v. MOWBRAY.

JOSEPH MOWBRAY made his will, dated 11th December, 1780, and thereby devised his real estate to *Isaac Rayner*, in trust, to permit his, the testator's wife, to receive the rents, &c. for her life; and, after decease, to sell the same, and then as follows; "to divide and pay the monies arising by virtue of the sale of his said estate, to, and among all and every such person and persons, who shall appear to be *related to me only*, share and share alike; and that such person or persons shall prove himself, herself, or themselves entitled to the same, in six months after my said estates shall be so sold as aforesaid; save and except my nephew *John Wood*, of *Morpeth*, near *Newcastle*, to whom I give one shilling only."

The plaintiff was the executrix of the trustee, the defendants were surviving sisters of the testator, and children of a deceased brother, and also of surviving sisters.

The

The question was, whether any persons could take shares of the property, but those who would be entitled under the statute of distribution.

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 RAYNER  
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Mr. *Solicitor-General*, for the children of the surviving sisters, contended—that although the general rule was, that the word *relations* only signified such persons as were next of kin, within the statute of Distribution; yet, that in this case, the words were clearly meant to be more expressive. That, by excluding the nephew, whose mother was alive, and who consequently was not one of the next of kin, the testator clearly meant to include persons in the same degree. That, in fact, this was precisely the same case as that under General *Honeywood's* will (*Bennet v. Honeywood*, Ambl. 708.) The division must therefore extend to the children of the sister, and be in equal proportions. *Thomas v. Hole*, Forrest. 241. *Jones v. Beale*, 2 Vern. 581. *Blackler v. Webb*, 2 P. W. 383. *Philips v. Garth*, ante, 64.

Mr. *Mansfield* insisted—that the division must be *per stirpes*; and that that had always been the construction of the statute, with respect to the representatives of dead persons.

Lord Chancellor said—the difficulty was how to construe the word *relations*, but by a reference to the statute of Distributions. If it was a recent matter, there might be a doubt; but he took the statute to be declaratory of the old law. When once a rule has been laid down, it is best to abide by it. We cannot always be speculating what would have been the best decision in the first instance.

Though the distribution is deferred to the death of the wife, that does not prevent the interests from vesting at the death of the testator (a) (b).

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(a) Reg. Lib. B. 1790. fol. 205.

(b) The doctrine upon this subject is collected in the Editor's notes to *Philips v. Garth*, ante, 64, and *Masters*

*v. Hooper*, post, vol. iv. 207. Vide also *Stamp v. Cooke*, 1 Cox, 234, and *Pope v. Whitcombe*, 3 Meriv. 689.

### RAMSDEN v. HASSARD (a).

Lincoln's-Inn  
Hall, 22d March.

GENERAL *Carpenter*, by his will, gave personal property to, Estate for life in  
his wife for life, then to his two daughters, to be distributed personality, by  
to the children of their bodies by their last wills and testaments. implication.

(a) Reg. Lib. B. 1790. fol. 315.

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RAMSDEN  
v.  
HASSARD.

The question was, what should become of the intermediate interest, and *Lord Chancellor* thought it must go to the daughters for life (a).

(a) This case was cited in the argument to *Upton v. Lord Ferrers*, 5 Ves. 802. Upon the subject of *Implication*,

vide the Editor's note to *Brown v. De Lact*, post, vol. iv. 534.

Lincoln's-Inn  
Hall, 22d March.

Trustees ordered  
to pay costs, on  
misconduct.

### DAWSON v. PARROT.

UPON further directions, it appeared, from the Master's report, that the defendant *Steel* had received, as executor of the testator, the sum of £2,079. 0s. 7½d. and that he had paid £1,538. 17s. 6½d. which reduced the balance in his hands to £540. 3s. 1d..

The defendant *Steel* is an attorney, who made the testator's will, and appointed himself a trustee, and the will directs the trustees to place out the testator's money to the best advantage, for the plaintiff's maintenance and education: by his answer he claimed £156. 9s. 9d. for a bill of costs due to him for business done previous to the death of the testator, this bill the Master had taxed at £75. 10s. 7d.; he had also charged £195. 10s. 1½d. for business done after the testator's decease, this bill had been taxed at £52. 17s. 10d.—He appeared to have retained this balance in his hands from the year 1783.

*Lord Chancellor* ordered him to pay the costs of taxing the bills, interest for the balance in his hands, and refused to give him the costs of the suit (a).

(a) The cases upon this subject are collected in the note to *Newton v. Bennet*, ante, vol. i. 362.

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Hall.

### BOURDILLON v. ADAIR.

Wife's legacy not  
to be paid to the  
husband without  
her consent taken  
before commis-  
sioners, she being  
abroad.

THIS was a petition for the payment of a legacy of £167 given to the wife, to the agent of the husband, without the consent of the wife being taken in the usual way.

The ground of the petition was, that the parties lived at *Tortola*, and that a commission to take her consent would be so expensive, as to run away with great part of the legacy.

It was admitted, that it was usual in sums under £100 to do it without consent so taken (a).

(a) By a subsequent rule of the court to £200. 5 Ves. 74. 8 Ves. 201. 512. 524.

But the *Lord Chancellor* refused to do it without a commission (a).

(a) But it appears that if the consent of the wife be taken before any competent authority belonging to the foreign state in which she resides, and

that her examination be properly attested, a commission will not be required. *Minet v. Hide*, ante, vol. ii. 663, and the Editor's note to it.

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BOURDILLON  
v.  
ADAIR.

*Ex parte* CROSSLEY.

Lincoln's Inn  
Hall.

A BILL was drawn 17th March, 1788, by *Hall*, for *Livesey and Co. Manchester*, upon *Livesey and Co. in London*, for £200, payable to *Hartley*.—This bill was indorsed by *Hartley* to the petitioner, for a debt of £147. 10s. which was then owing from *Hartley* to the petitioner, which debt was afterwards reduced by the payment of £101. 10s. to £46.

A bill being pledged in part, the whole may be proved by the pledgee.

The petitioner claimed to prove the whole sum of £200, and to receive dividends till he should have received £46, but the commissioners only allowed him to prove £46. A dividend had been made of 2s. 9d. in the pound.

He now petitioned for leave to prove the whole, and receive dividends, till he should have received £46, and in support of the petition was cited the case, *Ex parte King*, 1 Co. B. L. 203.

And the petition was allowed (a).

(a) Lord Loughborough, in *Ex parte Bloxham*, 5 Ves. 448, contradicted this doctrine, but his order was afterwards discharged by Lord Eldon, 6 Ves. 600, his Lordship having previously, upon a petition in the same bankruptcy, 6 Ves. 449, followed the present case, observing, that though you cannot hold the

paper of the bankrupt, and prove beyond your actual debt upon it, you may have the paper of third persons, those persons being indebted to your debtor in more, and you may prove to the whole amount. Vide also *Ex parte Downward*, Co. B. L. 167, 168. *Ex parte Rushworth*, 10 Ves. 412.

*Ex parte* ARMSTRONG, a Lunatic.

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A REFERENCE had been made to the Master, to enquire, among other things, who were the next of kin of the lunatic. Before the Master made his report, the lunatic died. There being disputes among several persons, with respect to the lunatic's will, and who were his next of kin, it was wished by some of them, that the Master should still make his report; and on the hearing of this petition, it was prayed, that the Master should be directed so to do.

Where there is a reference to the Master, in a case of lunacy, he shall make his report although the lunatic be dead.

*Lord Chancellor*.—The order does not abate by the death of the lunatic; any party may still prosecute it, and take out the Master's report. I say nothing as to the costs of the report; that may be a future consideration.

*Ex*

1791.

*Ex parte CLARKE, in the Matter of LIVESAY, &c.*  
Bankrupts.

Indorser bound by his indorsement, though the bill is made to a fictitious payee.

**P**ETITION to be admitted a creditor, in respect of certain bills indorsed by the bankrupt to the petitioner. The bills were made to fictitious payees. But it was said, that circumstance was of no consequence against the indorser.

*Lord Chancellor.*—It is clear that, as against the indorser, it does not signify what the bill is. The indorsee may come against the indorser, though the bill is a mere nullity in other respects. It is the indorser's business to see what he can make of the bill, but he, by his indorsement, is certainly liable to the indorsee (a).

(a) So it has since been determined, that in action against indorser, it is not necessary to prove any indorsement on the bill prior to that of the defendant. *Critchlow v. Parry*, 1 Campb. 182. It had long before been decided, that in an action against the indorser, the hand-writing of the drawer need not be proved. *Lambert v. Puck*, 1 Salk,

127. *Lambert v. Oakes*, S. C. 1 Lord Raym. 443.

The present was one of the numerous cases which arose in the bankruptcies of *Livesay* and Co. and *Gibson* and Co. a succinct account of which will be found in the note to the case of *Bennett v. Farnell*, 2 Campb. 130. 180.

S. C.

1 Ves. jun. 292.

Lincoln's-Inn  
Hall, May 4th.

A person made defendant, who in fact is only a witness, if he answers, must answer fully, though he might have pleaded.

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## CARTWRIGHT v. HATELY.

**A** BILL filed by the executors of the late Lord *Dudley* and *Ward*, against the defendants *Hately* and son, for an account of monies received and disbursed by them, as agents of Lord *Dudley*, with respect to coal mines.

The son, by his answer, insisted, that he was not liable to account, not being the agent of Lord *Dudley*, but merely a clerk to his father. Exceptions were taken to the answer, which being referred to the Master, he reported the answer was sufficient. Exceptions being taken to the Master's report—

*Lord Chancellor* thought it must be taken advantage of by plea, not answer.

Mr. *Abbot*, for the plaintiff, said—that from the time of Lord *King* to Lord *Bathurst*, there were cases in which the Court had held, that to insist by answer that the party was not liable to account, was bad, that it must be by plea, and that his Lordship had held it so in the case of *Williams v. Farrington*.

Mr.



Mr. *Partington*, for the defendant, said—such a plea would be a negative plea, and, as such, bad.

But *Lord Chancellor* allowed the exception, saying—that where the plaintiff has brought his bill against the witness as well as the principal, and the witness submits to answer, he must answer fully\*.

\* See *Ellison v. Cookson*, ante, vol. ii. p. 252.

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v.  
HATELY.

## SHEPHERD v. ROBERTS.

**C**OOKE was concerned in two partnerships, one with *Kilner*, another with *Wilkinson*, and carried on a separate trade: a separate commission of bankruptcy issued against him, under which he obtained his certificate.

The bill was by the plaintiff, for an account of another trade, in which plaintiff claimed to be a partner, and which was carried on in the names of *Shepherd and Co.*

By answer, *Cooke* set forth, that the plaintiff was a day labourer, and had nothing to do with the business, which was only a negotiation of notes in the names of *Shepherd and Co.*

Exceptions being taken to the answer, it was reported sufficient, and an exception being taken to the Master's report—

*Lord Chancellor* allowed the exception, on the ground that the defendant should have pleaded that the plaintiff was not a partner (a).

(a) The modern doctrine upon the subject of these two cases will be found in the Editor's note to *Ellison v. Cookson*, cit. sup.

Lincoln's-Inn  
Hall. Same day.  
S. P.

## EASTER TERM.

31 GEO. III. 1791.

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## DOCKER v. HORNER.

**A**N estate had been sold for payment of debts, and the money had been paid into Court. Prerogative probate necessary, where the sum exceeds £30, in order for the Accountant-General to pay money out of Court.

Mr.

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DOCKER

HÖRNER.

Mr. *Mansfield* moved, that the Accountant-General might pay some debts, one of £42, the other £43, without the parties producing a prerogative administration to the creditor, they having produced an administration in the Court of the Bishop of *Litchfield*, where the assets were; but the Accountant-General had refused to pay without a prerogative administration, the practice of the office being not to pay more than £30 without, though they paid inferior sums upon the probate of the ordinary of the diocese only.

But Lord Chancellor refused the motion, saying—that the practice must be uniform (a) (b).

(a) The same thing was done in *Sweet v. Partridge*, 5 Ves. 148. and in a case cited, 6 Ves. 118. *Upton v. Lord Ferrers*. It has been said, that in Lord *Thurlow's* time the sum for which such an order could be obtained was limited to £40; but that he put a stop to it, and that a great deal of money had been lost, where the sums could not bear the expence of a prerogative administration. It has been however recently repeatedly deter-

mined, that however small the amount of the sums, a prerogative probate cannot be dispensed with, *Challenger v. Murhall*, 6 Ves. 118. *Newman v. Hodgson*, 7 Ves. 409. *Thomas v. Davies*, 12 Ves. 417.

(b) Qu. Wentw. Off. of Executors, edit. 1763. p. 47. In case land be given to executors for payment of debts or legacies, this shall not be *bona notabilia*, as I take it, though it be assets. (*Serjt. Hill.*)

### RHEEDER v. OWER.

Testator ordered the interest of the residue to be paid to his sisters for life, and in case any of them should die leaving issue, then to transfer the principal of the *residuum*, to the children of the sister so dying, at twenty-one. One of the sisters died in the life of the testator, her children shall take her share of the residue.

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**JOHN MITCHELL**, possessed of considerable personal estate, made his will, bearing date 31st August, 1789, whereby, after giving a legacy to one of his sisters, he gave the residue to the defendants, his sister *Elizabeth Ower* and *Jonathan Hitchens*, whom he directed to sell his leasehold house, and to lay out the money which should be produced by the sale, and his whole *residuum*, in the funds, and to pay the interest thereof unto his sisters *Elizabeth Ower*, *Mary Blackburn*, *Ann Holdgate*, *Margaret Kettlewell*, and *Lydia Norton*, equally between them, for and during the term of their natural lives, for their sole use and benefit; and on further trust, that in case any of his said sisters should die, leaving issue, that the trustees “do and shall pay, assign, and transfer the share or proportion of the said *residuum*, to which my sister so deceasing was entitled at or before the time of her decease, to receive the interest and dividends thereon; unto and amongst all and every such child or children of such deceased sister, equally between them, share and share alike, at their respective ages of twenty-one years.” The testator died 13th February, 1790, leaving four of his sisters surviving him, but *Ann Holdgate*, the other sister, had deceased in the life-time of the testator, namely, in November, 1789, leaving the plaintiffs, *William*

*liam Rheeder and Martha Jennings*, her children, her surviving; who had attained their ages of twenty-one years, and they are the only other next of kin of the testator.

The plaintiffs filed their bill against the executors, the surviving sisters, their husbands and children, claiming to be entitled to one-fifth of the *residuum* of the testator's personal estate, as children of the deceased sister, and insisting, if they were not so, that the testator had died intestate as to that one-fifth of his personal estate.

Mr. *Solicitor-General* stated the words of the will, and argued—that the intention of the testator must have been, to give the property to all the sisters and their children, notwithstanding the words seemed to exclude the sister who died in his life-time.

Mr. *Mansfield*, on the contrary, contended for the defendants—that in order to take, the children must be children of such sisters as would be entitled to take the interest and dividends during their lives.

But Lord Chancellor thought the plaintiffs were entitled to this as an executory devise, and that, in a will so loosely drawn, it was more probable that was the testator's intent than the contrary (a).

(a) See the cases cited in the Editor's note to *Bridge v. Abbot*, ante, 227.

### FORSYTH v. GRANT.

**WILLIAM GRANT**, the testator, by a bond made by him, dated 26th February, 1761, previous to and in contemplation of his marriage with the defendant *Gratiana* (then *Gratiana Land*, spinster), became bound to *Barton Land*, (since deceased) and the defendant *Henry Land*, in the sum of £4,000; with a condition thereunder written, reciting the intended marriage, and that, in consideration thereof, and of said *Gratiana's* fortune, the said *William Grant* had agreed to leave to the said *Gratiana Land*, his then intended wife, or the child or children of the marriage, the sum of £2,000, the condition of the said bond therefore was, that if the marriage should take effect, and if the heirs, &c. of said *William Grant*, should, within three months after his decease, pay to the trustees, &c. the sum of £2,000, in trust, that the trustees, &c. should place out the same at interest; and in case there should be any children, should then pay the interest in manner therein mentioned, or if there should be no child or children living at the death of the said *William Grant*, in trust, as to the said principal sum of £2,000 for the sole use and benefit of the said *Gratiana Land*, then the bond to be void.

The

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OWER.

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1 Feb. jun. 298.

Testator enters into a marriage bond, to leave £2,000 to the wife and children, but if no children, then to the wife; by will he gives her a life-estate in his whole property; she shall not be put to an election, but take both.

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GRANT.

The marriage was solemnized, but there was no issue of the marriage.—*Barton Land* died, leaving his co-trustee surviving him.

*William Grant* afterwards made his will, by which he gave to some of the defendants, all the estate, real and personal, he was then, or might happen to die possessed of, in trust, and appointed his trustees to pay to his beloved wife *Gratiana Grant*, the annual rent or yearly profits of all his said estate, real and personal, yearly, and every year, by equal portions, and after her decease, to divide the estate among the plaintiffs.

The question was, whether the wife was to be put to an election between the sum secured by the bond, and her life estate under the will.

*Mr. Solicitor-General*, for the plaintiffs, contended—that the intention of the testator was, to give her an option between the two.

But *Lord Chancellor* held she should take both (a).

(a) The cases upon this subject are collected in a note to *Pearson v. Pearson*, ante, vol. i. 291.

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S. C.

1 Ves. jun. 299.

Power to divide a fund among all and every the children, to be vested at twenty-one, and in default or part execution, the whole, or part unappointed, to go to all: There were two children, a son and a daughter: A partial provision was made for the son, who died unmarried, and without issue: A subsequent appointment of the whole residue to the daughter, is a good execution of the power.

BOYLE v. The Bishop of PETERBOROUGH, and Others (a).

LADY *Frances Coningesby*, plaintiff's late grandmother, by will, dated 26th September, 1770, gave the residue of her personal estate, after payment of debts and legacies, &c. to Lord *Southwell*, and the defendant the bishop, their executors and administrators, in trust, to permit testatrix's daughter *Charlotte Boyle Walsingham*, (plaintiff's mother) to take the dividends, &c. for life, to her sole and separate use; and from and after her death, to pay, assign, and transfer the whole residue, unto, and for the benefit of all and every the child and children of her said daughter *Charlotte Boyle Walsingham*, if more than one, in such parts, shares, and proportions, manner, and form, and for such interests respectively, and with such benefit of survivorship, and other accruing interests, and to become an interest vested in such child or children, at such time or times respectively, as she, her said daughter, by any deed or deeds, writing or writings, to be by her sealed and delivered, in the presence of two or more witnesses, should direct, limit, or appoint; and in default, or in case of an incomplete appointment, then the whole, or the part unappointed, for the benefit of all the children equally, to be paid at twenty-one; and if but one child, to such one at the same age. Nevertheless, she did thereby declare, that if it should

(a) Reg. Lib. A. 1790. fol. 363.

happen

happen that any such child or children should attain his, her, or their age or ages of twenty-one years, in the life-time of her said daughter, then and from thenceforth all and every the said share and shares of such child or children, so attaining their said ages of twenty-one years, should be considered as vested interests in them respectively; and should be transmissible to his, her, or their executors, administrators, or assigns; yet so, nevertheless, as that the payment of the same share or shares should be postponed until after the decease of the said daughter, and then to be immediately paid. The will also contained several usual provisions, in case of children dying under age, &c. which are unnecessary to state; and testatrix appointed Sir *Sidney Stafford Smythe*, *Mary Trevor*, and *George Watson*, (who all died in her life-time) joint executors.

Lady *Frances* died 21st December, 1781, leaving defendant, the bishop, one of the trustees, alone surviving her (Lord *Southwell*, as well as the executors, having died in her life-time,) and also leaving *Charlotte Boyle Walsingham* her daughter, then a widow, surviving her; who, at the death of the testatrix, had two children, namely, *Richard O'Brien Boyle*, and the plaintiff, both infants; and the bishop having renounced administration, the same, with the will annexed, was granted to *Charlotte Boyle Walsingham*, who, by virtue thereof, collected property of the testatrix to a very large amount; to which she became entitled for life, with power of appointment, as above stated.

By deed poll of part appointment, in writing, duly executed as required by the will, *Charlotte Boyle Walsingham* did, by virtue of the power, appoint £4,500 four per cent. Bank annuities, part of the said residue, to her son *Richard O'Brien Boyle*, to vest in, and be transferable and appropriable to him, immediately after her death. And in the deed is contained a proviso, that nothing therein contained should be deemed to annul or make void the power of appointment given by the said will, as to the remaining part thereof; and that in case the said *Charlotte Boyle Walsingham* should die without making any appointment respecting the same, the said £4,500 annuities should be taken by said *Richard O'Brien Boyle*, in part of his share, that he might not, in default of appointment, take more than one moiety of the residue. Afterwards, *Charlotte Boyle Walsingham*, having given up her life interest in the said £4,500 annuities, they were sold; and the produce, being £3,880. 18s. 6d. was applied in the purchase of a commission in the army, for the benefit of the said *Richard O'Brien Boyle*. Afterwards, said *Richard O'Brien Boyle* becoming of age, by deed, declared that the money so advanced, was in part of his share of the residue of testatrix's estate. By a subsequent deed, £811, the produce of Mr. *Boyle's* cornetcy, which was sold at the time of purchasing the superior commission, was returned into the general fund.

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Before any further appointment was made, *Richard O'E Boyle* died, without issue, and unmarried.

Afterwards, by deed poll of further appointment, 22d A 1789, under the hand and seal of *Charlotte Boyle Walsingham*, declaring the state of the funds which constituted the residue, the death of *Richard O'Brien Boyle*, as aforesaid, leaving sister, the plaintiff him surviving, and then the only child of *Charlotte Boyle Walsingham*; and, that she was desirous of executing her power; it was witnessed, that, in pursuance of the power the said *Charlotte Boyle Walsingham* did direct that the trustees, and such persons who should for the time being be trustees, should stand possessed of the same, subject to the intent of said *Charlotte Boyle Walsingham* for life, in trust for plaintiff, and all and every other the child or children which said *Charlotte Boyle Walsingham* should or might, at any hereafter, have, or for any one or more of them, the plaintiff such other child or children, either wholly, or in such parts, shares and proportions, and for such absolute or limited interests, in such manner and form, and to become an interest or interest vested and payable at such times respectively, and with such allowance for maintenance, in the mean time, and with such benefit of survivorship, and other accruing interests, as the said *Charlotte Boyle Walsingham* by deed or will might appoint; and in default of appointment, and subject to the same, certain of the same should become an interest vested in the plaintiff, from and immediately after the date of the said instrument; and should be transmissible to her executors, notwithstanding her death in the life of the said *Charlotte Boyle Walsingham*; with proviso, nothing therein contained should prejudice a further appointment with respect to the remaining part of the residue.

By another deed poll, 27th April, 1789, reciting the same transactions, *Charlotte Boyle Walsingham* directed that the trustees should stand possessed of £10,000 new 4 per cent. Bank annuity and all other the residue of the personal estate of Lady Frances Coningesby, concerning which no direction or appointment had been made, subject only to the life estate of *Charlotte Boyle Walsingham*, in trust for the plaintiff, and all and every other the child or children which *Charlotte Boyle Walsingham* might thereafter have, in shares and proportions, manner and form, and to become an interest or interests vested, at such times, and with such allowance otherwise, and with such benefit of survivorship, and other accruing interests, (omitting "for such absolute or limited interest as the said *Charlotte Boyle Walsingham*, by deed or will, should execute as therein mentioned, should direct or appoint; in default of such appointment, equally in shares, &c. as directed by the will of Lady Frances Coningesby, in case of said *Charlotte Boyle Walsingham* not executing the power; and, subject as aforesaid, in trust for plaintiff, her executors, administrators,

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assigns, to be a vested and transmissible interest in her, subject as aforesaid, immediately after the execution of said deed.

*Richard O'Brien Boyle*, before his death, duly made his will and thereby reciting that he was entitled to an estate in the county of *Essex*, and also in reversion, after the death of his mother, to one moiety at least of the residue of the personal estate of his grandmother *Lady Frances Coningesby*, gave, devised, and bequeathed the same to the defendants *Lord Mulgrave*, *John Fitzgibbon* (now *Lord Fitzgibbon*), and *Henry Phipps*, in trust to sell the estate, and apply the produce of it to pay debts; and in case it should prove a deficient fund for that purpose, in trust to apply so much of his share of the residue of his grandmother's personal estate, as would be sufficient to make up the deficiency: he then gave several other legacies, and as to the rest and residue of his grandmother's estate, it was his will, that his trustees should be possessed thereof in trust for the plaintiff and her children, if she should have any, in the manner there pointed out. And he gave a real estate in *Ireland* to his sister, the plaintiff, for life; remainder to her second son in tail; remainder to her third, fourth, and every other younger son in succession in tail; and for default of younger sons, to her first son in tail; and in case his sister should die without issue male living at the time of her death, and no such issue male of his sister should attain twenty-one, then to vest absolutely in the defendant, the *Earl of Shannon*; and in case his sister should contest his bequest to the said *Earl of Shannon*, then his will was, that his sister and her issue should take no benefit by the bequest therein made to them respectively, but that *Lord Shannon* should be entitled absolutely to the residue of his share of his grandmother's personal estate; and appointed his trustees executors, who proved the will.

By indenture of settlement, made after the marriage of *Charlotte Boyle Walsingham*, plaintiff's mother, with the Honourable *Robert Boyle Walsingham*, bearing date 27th November, 1776, and made between the said *Robert Boyle Walsingham* and *Charlotte Boyle Walsingham*, of the one part, and the defendant, the bishop, and *Charles Dunbar*, Esq. of the other part, reciting, that by the marriage settlement of *Sir Charles Hanbury Williams* with *Lady Frances Coningesby*, £5,000 was vested in *Charlotte Boyle Walsingham*, as one of the daughters of the marriage; and that *Richard Boyle Walsingham* had agreed that the same should be vested in trustees, as a provision for said *Charlotte* and her issue; it was witnessed, and *Richard Boyle Walsingham*, and *Charlotte Boyle Walsingham*, assigned the same to the trustees, to hold the same, in trust to permit *Richard Boyle Walsingham* to have the proceeds for life, and after his decease, in trust to permit *Charlotte Boyle Walsingham* to receive the proceeds, and after the decease of the survivor, to pay the said £5,000 to and among all and every the child or children, in such parts, shares, and

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and proportions, and in such manner and form, and at such time or times respectively, as the said Richard Boyle Walsingham and Charlotte his wife, at any time during their joint lives, or the survivor of them during his or her life, by any writing or writings under their hands and seals, or under the hand and seal of the survivor of them, attested by two or more credible witnesses, should order, direct, limit, or appoint; and in default of such appointment, or as to such part of said £5,000, of which no appointment should be made, in trust to distribute the same amongst all and every such child or children, in equal parts, shares, and proportions, (if more than one), the same to vest in, and be paid to the sons at twenty-one, and the daughters at twenty-one, or days of marriage after eighteen; and if only one child, to vest in that one at the same time; and reciting, that under the will of the Countess of Kildare, the said *Frances Boyle Walsingham* would, in case she should survive her mother, be entitled to £4,000, and the residue of the said Countess's personal estate, which was then vested in the funds, (in case *Charlotte Boyle Walsingham* should survive *Lady Frances Coningesby*), *Robert Boyle Walsingham* covenanted to assign the same to trustees to the same uses.

This property was now become vested in the defendants, the bishop, and Lord *Walsingham*.

Robert Boyle Walsingham died many years ago, and *Charlotte Boyle Walsingham*, by her will, 7th July, 1789, duly executed under the settlement, by virtue, and in exercise and execution of the said settlement, and of all other powers and authorities, directed, that from and immediately after her decease, the defendants, the bishop, and Lord *Walsingham*, should stand possessed of the whole of the said funds, upon trust for the plaintiff, her daughter and only child, her executors and administrators, and appointed the plaintiff executrix of that will.

The testatrix, *Charlotte Boyle Walsingham*, died 12th April, 1790, without revoking the will, or making any other will or appointment, and without having had any other issue, and leaving plaintiff, her only child, her executrix, her surviving; and the plaintiff proved the will, and obtained letters of administration *de bonis non* of the personal estate of *Lady Frances Coningesby*, by which she became their personal representative: in which capacity, and also as only next of kin of her brother *Richard O'Brien Boyle*, she filed her bill against the defendants, the bishop, and Lord *Vernon*, as trustees of the residue of *Lady Frances Coningesby's* estate, the bishop, and Lord *Walsingham*, as trustees of the property settled by the indenture of 27th November, 1776, and against the other defendants, the executors of *Richard O'Brien Boyle*, and Lord *Shannon*, his devisees and legatees, praying to have her right to the trust fund declared, an account of what is coming due to her, and that the same may be paid and transferred to her.

The

The defendants, Lord *Mulgrave*, Lord *Fitzgibbon*, and *Henry Phipps*, the executors of *Richard O'Brien Boyle*, insisted, by their answer, that the appointment made by *Charlotte Boyle Walsingham* was not a good execution of the power reserved to her by Lady *Frances Coningesby's* will, and the settlement; and that the plaintiff is entitled to no more than a moiety, the other moiety having vested in their testator. Lord *Shannon* submitted, whether the appointments were good, as far as they related to Lady *Frances Coningesby's* residue. The other defendants were only made so, as trustees of the fund.

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The cause came on to be heard on *Friday* the 13th, and *Tuesday* the 17th of *May*.

Mr. *Solicitor-General*, Mr. *Mitford*, and Mr. *King*, for the plaintiffs, contended—that the appointments were good. There is no doubt that the first instrument in favour of Mr. *Boyle* was a good execution of the power, as far as it extended. Then, he dying without issue, Mrs. *Boyle Walsingham* made a partial appointment in favour of her daughter, and afterwards, an appointment of the whole likewise in her favour, but with power to make a new disposition. The only questions are, Whether Mrs. *Walsingham* had such power; and, secondly, Whether she has executed it. A person having such a power, may execute it, although one of the objects of the power be dead; otherwise, in all cases of powers to divide among children, the death of one child would extinguish the power. But it was held in *Maddison v. Andrews*, 1 Ves. 57. the death of one of the objects did not affect the execution of the power; and that though the appointment to the daughter who was dead was void, the other appointments were good. The next question is, Whether she had exercised this power improperly. She seems to have made the properest appointment possible. The son being dead without issue, she has made an appointment to the daughter. She had before executed an instrument, making a provision for the son; then, after his death, she makes a provision for her daughter, and any children she might herself afterwards have. The only objection that could possibly be made, would be that she had made an improper appointment; but considering how extensive her power was, no such objection could be made, unless they can shew, on the other side, that the death of Mr. *Boyle* precluded any appointment. But this could not be; she might have, originally, made an appointment, that the share given to Mr. *Boyle* should, in case of his death, go to Miss *Boyle*, for she had a power to give a limited interest, with such benefit of survivorship as she should think proper. Now, if she had appointed moieties to each, with survivorship between them, that would certainly have been good; and if she has done no more than that, it must be a good execution

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of her power. What she has done, is exactly equivalent to such an appointment; for, after the death of Mr. Boyle, there was no object upon which to execute the power but Miss Boyle; and the power must be argued upon as it was circumstanced when executed, she having her whole life to execute it in. Any appointment she could have made, would have been defeasable by subsequent births of children. In *Chadwick v. Doleman*, Vern. 528. where the second son became eldest, the Court thought the first appointment defeasible. Then it is said, the appointment was to be to all and every the children. If she executed her power when there was only one child, that child was all and every. This will go to both the appointments; there is no material difference between them. There was an appointment in favour of Mr. Boyle, which was not elusory.

Mr. *Attorney-General*, for the executors of Mr. *Richard O'Brien Boyle*.—The appointment in this case, does not appear to be agreeable to the power. This is for the benefit of *all and every of the children if more than one*, and in default of appointment, or in case of an incomplete appointment, then the whole, or the part unappointed, to be for the benefit of all the children equally, at twenty-one; and there is a proviso, that the shares shall vest in children attaining twenty-one, in the life-time of Mrs. *Walsingham*; the interest is to vest and be transmissible to their representatives, though what the sum would be, would remain uncertain, as Mrs. *Walsingham* had her whole life to execute the power. Suppose there had been five or six children, and two or three had died in the life-time of Mrs. *Walsingham*, after having attained their ages of twenty-one, it could not be in Mrs. *Walsingham's* power to have appointed to the living children only.

Lord Chancellor.—Would an appointment to the representatives of the dead child be a good appointment?

Mr. *Attorney-General*.—Her business would only be to name the sums that had already vested at twenty-one.

Lord Chancellor.—What sort of conveyance could she make? One question is, Whether such a power, without special words, would vest any thing in the life-time?—Would an instrument, applying to the representatives of a dead child, be a valid instrument?

Mr. *Attorney-General*. In *Maddison v. Andrew*, there was an appointment to the dead child, and the objection there made was, that in fact it was an appointment to the mother herself, who was the representative; and did not turn on any presumed impossibility of

of appointing to a dead child: but my argument turns on the special directions in this will; after attaining the age of twenty-one, Lady Frances has only left Mrs. *Walsingham* the power of naming the sums. The representatives of a dead child may, certainly, be put, in such a power, in the place of the dead child, if the testator thinks proper so to do: here the intention is particularly pointed to, by postponing the payment to the death of Mrs. *Walsingham*; the plain import of which is, that in the case that has happened, an interest vested in Mr. *Boyle* at twenty-one. Then as to the power under the settlement, that is, to distribute the funds among *all and every* the children; it is a contradiction to the power, if the appointment can be to Miss *Boyle* only. The executors of Mr. *Boyle* have, therefore, a claim to a moiety of both funds. With respect to the appointment of the £4,500 stock being an execution of the power, £817 of it was brought back, by another deed, into the power of Mrs. *Walsingham*; her recalling that part, is inconsistent with the idea of its being an appointment; she, having executed her power by the instrument, had precluded herself from taking it back. But considering it as an appointment, if the clause in Lady *Frances Coningesby's* will applies to the subject, see what has been done; out of between £60,000 or £70,000 Mrs. *Walsingham* has appointed about £3,000 (the value of the stock) to the son. Such a share has always been held elusory. If Mr. *Boyle* was now suing, it could not be held a good execution of the power. And his representatives have the same claim as he would have had, if he were alive; as by Lady *Frances Coningesby's* will, Mrs. *Walsingham* was under the necessity of making a provision for him.

*Lord Chancellor* thought the taking back the £811, as it was not for her own benefit, but thrown into the general fund, and subject to further appointments, was immaterial.

Mr. *Hardinge* and Mr. *Hollist*, for Lord *Shannon*.—We contend that, if Mrs. *Walsingham* had a power of appointing after her son's death, the exercise of that power must be with a view to there having been two children, and that the execution of it, in the manner this was done, was elusory, and a deceit upon the power. But we contend, that, after Mr. *Boyle's* death, all the power was gone, and his interest became a vested interest in a moiety only, subject to a fair appointment in his life-time. The clause in the will of Lady *Frances* vesting the interest, refers to the contingency of Mrs. *Walsingham's* living. The several clauses are independant of one another. By the first, the children were to have the whole after Mrs. *Walsingham's* death. The second clause provides for the non-execution, or part execution of the power; the third, that if a child attain the age of twenty-one, in the life-time of the mother, the share should be vested, subject to

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her declaration as to the quantity of the share. If the appointment by the mother after the son's death, be good, it must be with a view to there being two children, otherwise if a shilling had been given to him, that would have enabled the mother to give £70,000 to the daughter. It is true, as Mr. *Mitford* argued, she might have appointed a moiety to each, with remainder to the other, in case of dying unmarried, but Mr. *Mitford*, in order to make this argument apply, was obliged to state it as an appointment of a moiety. But in the present case, the appointment to the son is not of more than a nineteenth part, which is much less, that has been held to be elusory. In the case of *Wall v. Thurborne*, 1 Vern. 355. a case is cited of *Cragrave v. Percost*, where a man having two daughters, one by a former, and another by a second wife, gave his estate to his wife, to be by her distributed between his daughters, as she should think fit; she gave £1,000 to her own daughter, and but £100 to the other, and, on the mere disparity of the sum, it was held elusory, and an equal distribution was decreed; and Lord *Hardwicke* in *Maddison v. Andrew*, argued from this case. So in *Pawlet v. Pawlet*, 1 Wils. 224. £29,900 out of £30,000 applied to one child was held void. The power of appointment among children, must be exercised by a discretion operating upon all. It is given for the purpose of ensuring the obedience of the children. It may be the case of two, or the case of ten, and surely if, of a large number, one dies after the interest is vested, a gift to the others could not be good. In the case cited by Mr. *King* (*Chadwicke v. Doleman*) there was no vested interest. One great difficulty which arises in this case is, what could be done, supposing no appointment to have been made during the life of both: Is it the rule of the Court, that something shall be done for the dead child; to say that he is to be kept out, seems strange; and, therefore, it necessarily follows that the power is at an end. Suppose an elusory execution made in the life-time which the parent meant to correct, or that being fair when made, if afterwards it becomes otherwise, and the child being dead, it cannot be amended, it follows, that as no fair appointment can then be made, the power must be gone. The whole turns upon the clause, that if one child should die without issue, the other should take that share; for we admit the parent could not give to the representative. *Maddison v. Andrew*, no right was vested, but here the interest was vested by the clause in the will, which supposes the appointment to have been made. In *Cholmondeley v. Meyrick*\* it was held, that the interest was vested, though the sum

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\* *Cholmondeley v. Meyrick*, in Chancery, 20th April, 1658.—In this case the trust term of 300 years, to commence at the death of *Charles Cholmondeley*, was—

“ If there should be an eldest or only son, and only two other children, then the sum of £6,000, for the portions of such two other children, the said several sums,



was uncertain; but here his interest was a vested interest in a moiety, subject to be diminished by the birth of other children. The gentlemen on the other side, go upon there having been an appointment of £4,500, but, in fact, though he had the money, that appointment was imperfect: by the appointment, it was to be transferrable to him at her death, so that it never took place as an appointment: and in the case of *Maddison v. Andrew*, the Court holding, that the interest did not vest till the death of the mother, therefore gave the whole between the two surviving children. If Mr. Boyle had lived to come here himself, the Court must have said Mrs. Walsingham had eluded the power. There is also another ground on which this execution of the power is void—that it was an immediate gift of the daughter, and, by possibility, might come to the mother as her representative.

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Lord Chancellor, during the argument, said—a gross inequality of division, if accounted for upon honourable motives, could not

sums, for the portion or portions of such daughter or daughters, and younger son or sons, to be raised and paid to him or them, at such time or times, and in case there should happen to be more than one child, besides an eldest son, then in such shares, proportions, and manner, as the said Charles Cholmondeley, by deed or writing, to be by him duly executed in the presence of two or more credible witnesses, or by his will, should direct, limit, or appoint; and, for want of such appointment, to be equally divided amongst them (if more than one such daughter or younger son) share and share alike, and to be raised and paid in manner following, (that is to say) to such younger son and sons at his or their age of twenty-one years, or to be sooner applied or employed for his or their advancement or benefit, as the said trustees should think fit, and to the daughter and daughters, at her or their respective age or ages of twenty-one years, or day of marriage, which should respectively first happen, after the decease of the said Charles Cholmondeley, or in case any such daughter or daughters should attain the age of twenty-one years, or be married, or any such younger son should attain his age of twenty-one years, in the life-time of the said Charles Cholmondeley, then to be paid immediately after the death of the said Cholmondeley, unless the same should have been raised and paid in his life-time, which it might be with his direction. Provided, that in case any such daughter or daughters, younger son or sons, should die before his or their portions should become due or payable, or be sooner paid as aforesaid, then the portion or portions of such of them so dying, should go and be paid unto, and be equally divided amongst the survivor or survivors of them, when the original portion or portions of such surviving daughter or daughters, younger son or sons, should become due and payable as aforesaid." *Provido*, such younger child not to have greater portion than limited, if no such other younger child have not been born. *Provido*, if all die before any of their portions should become payable, then the term to cease.

There were two younger children, daughters, one of them married, and died in the life-time of the father. The question was, whether her portion vested, and so was transmissible to her representative, (her husband) or survived to her sister, who survived her father.

April 20th, 1758. Lord Keeper Henley decreed Mr. Meyrick, the husband, to be entitled to the £3,000, which had actually become due, though the payment was postponed on account of the fund (a).

(a) There is a very full report of this case from Lord Northington's MSS. 2 Eden, 77.

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be held elusory:—and the question was, whether the son dead was not a sufficient motive (a).

Mr. Solicitor-General beginning to reply, Lord Chancellor said he had spoken to the following effect:

It would be a great deal to say that, by the death of the son the power was gone; because if that were so here, where there were only two children, it must be so where there is a larger number.

I think, without the particular clause of vesting the share fund could not vest whilst the power remained.

The question, then, is as to the effect of the clause. It is not intended to bind down the property, but appears to me to be intended to vest the property, in case there was no appointment.

Then the question is, whether there can remain a capacity of appointment, where there can be no power of distribution.

But I think the making an appointment is material, because it shews her intention to exercise her power, because otherwise the fund would go equally (b).

(a) Upon the subject of elusory appointments, vide *Robinson v. Hardcastle*, ante, vol. ii. 22.

(b) So in the case of *Vane v. Lord Duncannon*, 2 Sch. & Lef. 48, where a trust was created to raise £36,000, for the portions of three daughters, as their mother should appoint, and in default of appointment, in equal shares, at twenty-one, or marriage, and one of the daughters died after twenty-one. Lord Redesdale was clearly of opinion that the death of the daughter did not put an end to the power of appointment in favour of the other two. But from the very peculiar construction of the instrument, which was extremely ill drawn, he considered the mother as having no power of appointment over £12,000, the portion of the deceased's daughter; but that an unequal appointment of the remaining £24,000 was good, and that it was no objection to it that it was contained in the same deed, with an invalid appointment of the £12,000.

The present case has also been expressly approved of by Lord Eldon, in *Butcher v. Butcher*, 1 Ves. & Bea. 90, as reforming the old practice of executing a power of appointment after the death of one of the objects which was to give part to the surviving children, making no appointment of the residue, which was permitted to go as

in default of appointment.—Sugd. on Pow. 554.) Lord R determination also in *Reade v. 5 Ves. 744*, is there considered Lord Eldon as an approbation of the present doctrine as to the appointment of shares, where a devisee, having to appoint to his four children, whom he died in his life-time, appointed three-fourths to the three surviving children, the one who died was entitled to a fourth. The latter part of that determination seems erroneous as that fourth ought to have been divided among the surviving children and the representatives of the deceased. Lord Eldon observed, I did not understand it, and that quite novel in that respect. Mr. Rankine ranks the case among those in which a bequest was considered not as a trust, but as a bequest over to the object in default of appointment by intention, ib. 391: and in *Casterton v. 9 Ves. 445*, upon a similar case where all the children died in the lifetime of the donee of the power, it was held without appointment Sir Grant held, on the authority of *v. Reade*, that the children took as tenants in common. The case is ever extremely obscure: see referred to from the Register's Sugd. on Pow. 461, n.

I say nothing as to its being elusory, because I think she had the power absolutely.

*The plaintiff must have a decree (a).*

That a power of appointment does not prevent an interest in money vesting, subject to be divested, vide *Cholmondeley v. Meyrick*, 1 Eden, 77. *Smith v. Camelford*, 2 Ves. jun. 698. *Reade v. Reade*, cit. sup. And as to the

application of the doctrine to real estate, vide *Doe v. Martin*, 4 T. R. 39, and all the subsequent authorities collected by Mr. Sugden, 142, et seq. (a) Reg. Lib. A. 1790. fol. 363.

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1 Ves. jun. 335.  
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## WAKE v. WAKE.

**THOMAS WAKE**, by will dated 1st October, 1783, gave freehold estates to the defendant, his son, of the value of £240 a year (enumerating them) subject nevertheless, and the testator charged all his said real estates with the payment of one annuity or clear yearly rent-charge of £35 a-year to plaintiff (his widow) for and during the term of her natural life, payable by quarterly payments, and also gave her a legacy of £100 out of his personal estate. The testator died 25th July, 1784.

The annuity was regularly paid to, and received by the plaintiff, the widow, to the 1st August, 1787, and she made no further demand, but on the 6th of August, in that year, she, by her attorney, made a demand of her dower, and afterwards filed the present bill, paying an account of rents and profits of the real estates, and that she might be paid her dower thereout.

To this bill the defendants put in their answers, insisting, that the annuity and legacy ought to be taken by the plaintiff, in satisfaction of her dower, and that, by accepting thereof, she had made her election.

Mr. Mitford, for the plaintiffs, insisted that, supposing this to be a case of election, the widow had not made her election to take the annuity instead of her dower. In order to shew she did so, her right must be explained to her, which did not appear to have been done here; she had never been called upon to execute any release. He cited the cases of *Hender v. Rose*, 3 P. W. 124. n. *Pusey v. Desbouverie*, 3 P. W. 315. *Duke of Montague v. Lord Beaulieu*, 6 Bro. P. C. 232. *Boyn/ton v. Boynton*, before Sir Thomas Sewell, Master of the Rolls, 15th May, 1782, (ante, vol. i. p. 445. on the re-hearing) and, to shew that the annuity was not a bar of the title to dower, he cited *Lawrence v. Lawrence*, 1 Eq. Abr. 218, 219. *Leman v. Leman*, 8 Vin. 366. *Pitt v. Snowden*, (cited ante, vol. i. p. 292. n.) and took notice

Testator gives his widow an annuity (charged on an estate of which she would be dowable) she must elect between that and her dower. Accepting payment of the annuity for three years, is not an election to take that in lieu of dower.

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of *Arnold v. Kempstead*, Amb. 466. *Villa-real v. Lord Galway*, ibid. 682. and *Jones v. Collier*, ibid. 730.

Mr. Justice *Buller* thought, that upon the authority of the cases, this was a case of election; but that the widow had not, by accepting the payment of the annuity for three years, made her election to take that in lieu of dower: therefore decreed for the plaintiff: he added a case of *Oswald v. Anderson*, here in 1788 or 1789 (a).

(a) See upon the first point the cases collected in the Editor's note to *Arnold v. Kempstead*, 2 Eden, 536. and *Pearson v. Pearson*, ante, vol. i. 292. Upon the second point, *The Earl of North-*

*umberland v. The Marquess of Granby*, 1 Eden, 489. *Butricke v. Broadhurst*, ante, 88. S. C. 1 Ves. jun. 171. *Freke v. Lord Barrington*, post, 274.

Mr. Justice *Buller*,  
for Lord Chan.

### CATTELL v. MONEY.

A sum of money being in Court, to be laid out in lands which, when purchased, would be subject to the bond debts of testator: the debts decreed to be paid out of the fund in Court.

THE testator, *James Money*, being indebted to the plaintiffs by bond, by will, dated 20th April, 1785, in the first place, willed and directed that his legacies and funeral expences should be fully paid and satisfied, and charged his real estates with the payment thereof, and gave the same to defendant, his eldest son, for life, with remainder to trustees to preserve contingent remainders, remainders to the defendants, his grandsons, successively for life, with remainder over, and directing that his £8,000 three *per cents.* should not be applied in payment of a mortgage upon his real estate, gave the residue of his personal estate, subject to the payment of his debts, legacies, and funeral expences, to his son *William Money*.

The personal estate not being sufficient to pay debts, an act of parliament passed in the thirtieth year of his present majesty's reign, for vesting a part of the freehold estates in trustees, to be sold, and for laying out the money to be raised by the sale in other lands, to be settled to the same uses, reciting the will, and the death of testator, leaving *William Money* his son and heir, and that the said *William Money* had six sons (defendants), all under twenty-one years of age, and that *William Money* was desirous the lands therein mentioned should be sold, and had contracted with the Earl of *Warwick* for the purchase thereof, for the price of £20,000, but that, on account of the limitations in the will, and the infancy of the sons of *William Money*, the sale could not be effected without the aid of parliament, it was enacted, that the premises should be vested in trustees, to the intent that, upon payment by Lord *Warwick* of the purchase money into the Bank of *England*, the trustees should convey the premises to him

in

in fee, and that the trustees should, out of the purchase money, pay the expences of procuring the act, and lay out and invest the residue in land, to be settled to the same uses with the lands to be sold.

Lord *Warrick* completed the purchase, and paid the purchase money into the Bank.

The bill prayed that the plaintiff's bond debts might be paid out of the money so lying in the Bank.

Mr. *Mansfield*, for the plaintiffs, argued—that it would be much more convenient to all parties to have the debts paid out of the money in the Bank, than to have it laid out in land, which would be liable to be again sold for the payment of debts.

Mr. Justice *Buller*, sitting for Lord Chancellor, decreed them to be so paid.

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KENTISH v. KENTISH (a).

**T**ESTATOR, seised of freehold and copyhold estate, by his will said, "First, I will that all my just debts shall be in the first place paid and satisfied. Item, I give and bequeath unto *Green*, and his heirs," part of his freehold and copyhold estates.

The testator afterwards sold all his freehold and part of his copyhold estates, by which he left only copyhold at the time of his decease.

The personal estate being deficient, the bill prayed that the copyhold should be sold for payment of debts.

And Mr. Justice *Buller* held the copyhold to be sufficiently charged (b).

(a) Reg. Lib. A. 1790. fol. 491.

(b) This case resembled that of *Coombes v. Gibson*, ante, vol. i. 273. in the circumstance mentioned by Mr. *Richards*, in *Judd v. Pratt*, 13 Ves. 172, of there being no freehold. Where a testator having both freehold and copyhold, surrendered to the use of his will, charges all his real estate, the freehold and copyhold shall contribute rateably, *Groucock v. Smith*, 2 Cox, 297. *Secus*, where he has not surrendered the copyhold, as established in *Mallabar v. Mallabar*, Forr. 78. and several other cases cited 3 P. W. 97. n. over-ruling the contrary determination in *Harris v. Ingledew*, ib. for the reasons of which, see a most luminous account in the judgment of the

Lord Chief Baron, in *Hellier v. Tarrant*, Forr. 3d edit. 288. n. For the cases upon the subject of supplying surrenders, vide *Lindopp v. Eborall*, ante, 188. *Birby v. Eley*, vol. ii. 325. As to the act of the 55 Geo. 3. c. 192. vide *Carew v. Askew*, ante, vol. ii. 56. *Pike v. White*, post, 286.

The cases in which debts were held charged upon real estate by force of introductory words, were much considered in the late cases of *Powell v. Robins*, 7 Ves. 200. and *Noel v. Weston*, 2 Ves. & Bea. 271. the latter of which resembled the present case, and *Coombes v. Gibson*, supra, in the circumstance its relating to copyhold. For the cases upon the subject, vide *Batson v. Lindegren*, ante, vol. ii. 94.

Mr. Justice *Buller*,  
for Lord Chan.

A general charge upon land for payment of debts, where testator had freehold and copyhold, the copyhold liable.

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8th June.

When stock is left to pay the interest to plaintiff for life, and then, after payment of gross sums, the residue to him, the Court will not permit the security to be lessened by laying out a certain sum to secure the legacies, and paying the residue immediately to the plaintiff.

## SOUNDY v. BINYON.

**BY** settlement, previous to the marriage of the plaintiff with *Sarah Varton*, his late wife, £3,000 Bank stock, part of the fortune of the wife, was transferred to trustees, in trust that, in case *Sarah Varton* should die in the life-time of the plaintiff, and there should be no children or child of the marriage (which was the case), the trustees should transfer the stock to such uses, &c. as *Sarah Varton*, notwithstanding her coverture, should by deed or will appoint.

*Sarah Varton*, then the plaintiff's wife, by will dated 3d May, 1787, by virtue of the power reserved by the settlement, appointed the £3,000 stock to the plaintiff, to be had, held, and enjoyed by him for his life, and to be transferred to him accordingly, and after his decease, appointed the sum of £1,000 to be laid out and invested for the benefit of his cousin *Susannah Padbury*, and the sum of £500 for the benefit of her cousin *Edward Binyon* and *Mary* his wife, for life, with remainder over, and £400 for the benefit of *Thomas Tilson*, and £200 for the benefit of *Mary House* for life, with remainder over, and £200 to be paid to her sister-in-law *Elizabeth Soundy*, and as to the residue of the £3,000 stock, the testatrix gave the same to the plaintiff, his executors, administrators, and assigns, and made him sole executor.

£500 of the stock was afterwards sold out, and the money lent on mortgage, the uses of which were declared to be the same as those of the Bank stock.

The testatrix died soon after, and the plaintiff proved the will, and having occasion for the residue of the remaining £2,500 stock, applied to the trustees to dispose thereof, and out of the money to arise therefrom, to invest the pecuniary legacies, amounting to £2,300 in the funds, in order that the plaintiff might receive the interest for life, and then, that the capital might be secured for the legatees, and to pay the residue to the plaintiff for his own use: and upon refusal, filed the present bill, praying that the stock might be sold, and the money might be paid into the Bank, in the name of the Accountant-General, in trust in the cause, and invested to the same uses, and the residue paid to him.

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The defendants, the legatees, by their answers, claimed their legacies, and prayed they might be secured.

Mr. *Lloyd* and Mr. *Brown*, for the plaintiffs, contended—that if a sufficient sum was laid out to secure the legacies, the legatees would not be injured; that, at the present value of Bank stock, there was nearly double what was necessary to secure the legacies,  
to



high surplus the plaintiff was entitled; and the latter cited a case of *Drinkwater v. Whipham*, at the Rolls, 14th February, 1791, where *Drinkwater*, by his will, gave to trustees £6,700 three per cents. and also all his other money in the funds, in trust to pay his wife £200 *per annum* for her life, and in case of her death without children, he gave the whole principal to his nephew *William Drinkwater*, and made him residuary legatee. The testator died without issue, and was possessed at the time of his death of the £6,700 three per cents. and also of £4,400 four per cents. which sums were transferred to the trustees, to secure the payment of the annuities. *S. Drinkwater* applied to the trustees for the £4,400, as the other fund appeared sufficient to secure the annuity. The trustees let him have £400; he afterwards applied for the remaining £4,000, but they refused to transfer it to him without the consent of Mrs. *Drinkwater*, who was applied to but refused, as it was lessening her security. *S. Drinkwater* brought his bill against her and the trustees, and, upon the hearing, the Honourable Court directed the trustees to transfer the £4,000 to him, that Mrs. *Drinkwater* should be at liberty to apply to the Court at any time, in case any appearance of deficiency should be made thereafter.

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The Honourable Court took time to consider of this case; and, this day, the case cited did not apply, as it was only to set aside sufficient to pay an annuity; but that the same thing had never been done when it was to secure gross sums. It would be to take away part of the security, as the stocks may fall, and not be sufficient, at the death of the plaintiff, to pay the sums charged, and therefore

*Dismissed the bill.*

GOVERNOR and COMPANY of the BANK of ENGLAND  
v. MOFFAT and Others(a).

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Lincoln's-Inn  
Hall, 10th June.

MES MOFFAT, Esq. being possessed of a very large personal estate, and particularly of a large sum in the several public funds, made his will, dated 8th August, 1790, and thereafter sundry specific and pecuniary legacies, gave "all the residue, and remainder of his personal estate not therein disposed of, to his wife *Elizabeth Moffat*, *Jeremiah Roydes*, and *Forbes* (three of the defendants), and the survivors and survivors of them, and the executors and administrators of such survivors, upon trust, to sell such part of the residue as should not be ready money, or be laid out and invested in the public stocks

Though a residue is specifically given, the Bank has no right to restrain the executor from transferring the funds.

(a) Reg. Lib. A. 1790. fol. 515.

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or funds, or upon government and real security, and to collect and get in debts which should be due to him, and to lay out and invest the money arising therefrom in such like stock or funds, or upon government or real securities at interest, and *from time to time to alter, vary, transfer, assign, and dispose of such stocks, funds or securities, and the money arising thereby to lay out and invest in or upon new or other securities, as to them* (the trustees) should seem meet, and, upon further trust, to pay unto, or permit the testator's wife, *Elizabeth Moffat*, and her assigns, during her natural life, to take the dividends, &c. for her use, with a proportionable part of the interest, from the last day of payment to the day of her death, and from and after her decease" then in trust for other of the defendants, who are infants, to be paid to the males at twenty-one, and to the females at twenty-one or marriage, with benefit of survivorship, and made his trustees executors of the will.

The testator died in the course of the year 1790, leaving the defendant his wife, and two brothers (who are defendants) next of kin, and the executors proved the will.

There were standing in his name at the bank £52,990 three *per cent.* consolidated annuities, £22,825 four *per cent.* annuities, £18,832 five *per cent.* annuities, and £2,000 bank stock.

The probate of the will being deposited at the bank, the plaintiffs caused so much thereof as related to the testator's interests in the several stocks, to be entered in the proper offices, (according to the acts of parliament) and subjected the same to the uses of the will, by causing entries to be made in the respective transfer books, in the words or to the effect following (*viz.*) "to remain during the life of *Elizabeth Moffat*, and at her decease to go as the will directs."

The executors and trustees applied in November 1790, to the bank, and requested them to permit a sale or transfer of the stocks which stood in the testator's name, to such person as they should appoint, which the bank refused, but were ready to permit a transfer into their own names, upon the trusts of the will, but which the executors would not accept, and brought an action against the bank in the Court of King's Bench, and filed a declaration, laying their damages at £100,000.

Upon this the bank filed the present bill, insisting upon its having been their custom, ever since the institution of the bank, that where any share or interest in the funds transferrable at the bank, is *specifically* bequeathed to one or more legatee or legatees, and no trustee or trustees are appointed, to permit the interest so bequeathed to be transferred to the legatee or legatees only, and to no other person or persons; and where any trustee or trustees are appointed, to suffer the interest to be transferred to the trustees only, but not to permit them to sell or transfer the same to any other person than the legatee or legatees beneficially interested therein;

herein; and therefore prayed an injunction to restrain the defendants from proceeding at law.

The defendants, by their answer, admitted the facts in the bill, and the practice of the bank, but insisted, that where no specific request is made of the stock, *but the same is included in the devise or bequest of the general residue of the testator's estate*, as in the present instance, the plaintiffs have no authority, nor have been used to restrain the executors from transferring to other persons than the legatees; and that, in such case, the plaintiffs are not bound to take notice of the trusts, but the defendants are alone answerable to the *cestui que trust*.

Upon the answer coming in, the defendants moved to dissolve the injunction; and the plaintiffs afterwards moved, that the injunction should be extended to restrain the defendants from proceeding to trial at law.

Upon these motions the question came on twice to be argued.

Mr. Solicitor-General, Mr. Mansfield, and Mr. Wooddeson, for the plaintiffs, contended, in support of the propriety and legality of their practice; and that it extended to the case of a residue, as well as of a specific legacy, wherever that residue was specifically given. That the practice was grounded on the construction of the statute 5 William and Mary, c. 20, by which the bank was instituted; and the other acts of parliament (a) which regulate the devise of this kind of property, and by which the probate of wills are to be deposited with them, for the purpose of extracting the trusts; and why to extract the trusts, unless they are afterwards to take notice of them? Where there are no trustees appointed, the bank are trustees. Where trustees are appointed, still they must enter the whole will, and must, consequently, see to the disposition of the property as co-trustees, or as a check upon the other trustees. They referred to Douglas, 525. *The King v. The Bank*, where the practice of the bank was admitted. Though the bank may not be liable in case of a misapplication, yet that is not laid down decisively; and though it be so, the bank have a right to the common privilege of trustees, to have the trusts administered by this Court, which is the proper and peculiar characteristic of its jurisdiction.

Mr. Milford and Mr. Stanley, for the defendants, argued—that now proper soever the practice of the bank might be in the case of a specific legacy of stock, it was not so in the case of a residue; and, in this case, it was a simple residue of a personal estate, which must necessarily vest in the executor, for payment of debts, and other necessary purposes. In the case even of specific legacies, and of terms of years, they do not vest in the legatees till

(a) 1 Geo. 1. st. 2. c. 19. s. 12, 30 Geo. 2. c. 19. s. 49.

after

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after the assent of the executor, who may want them for the payment of debts; till after the assent of the executor, the legatees of a bond cannot discharge it. This is like any other specific legacy, and the defendants therefore are entitled to call upon the bank for a transfer.

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*Lord Chancellor* acceded to this idea of the residue, in the present case, requiring, like a specific legacy of a term for years or other chattel, the assent of the executor; and he seemed to think that in all cases, the act of parliament giving a power to devise, and treating it as personal property, it must be subject to all the incidents of a gift of personal property; and, therefore, that the bank must permit a transfer of the stock: and dissolved the injunction (a) (b).

(a) The following note of the decision in that case, was taken by the *Attorney-General*:—

“The *Lord Chancellor* thought the operation of the acts was to enable the proprietor of stocks to make specific bequests of them, notwithstanding the previous negative words in the act, and therefore the assent of the executors is necessary to the validity of the bequest, in the same manner as their assent would be necessary to the validity of the bequest of a leasehold estate, bond-debts, &c. and therefore until assent, the action of the executors remained, and he thought the injunction must be dissolved:” Order pronounced accordingly, *de bene esse*, 10th June, 1791. The order was delayed a great while, the *Lord Chancellor* saying, he wished to consult *Lord Kenyon*. (5 Ves. 665.)

(b) By the old acts in *Queen Anne's* reign, creating stock, (which are enumerated, 2 Cox, 179.) it was only necessary to devise by a will in writing. In the statutes in the following reign, (cit. sup.) the clause was first inserted, which created so much perplexity, authorizing the devise of stock, by will in writing, attested by two witnesses, directing that no payment shall be made upon such devise, until so much of the will as relates to the stock is entered at the bank, and that in default of such devise the stock should go to executors or administrators.

When the existence of this clause was first mentioned to *Lord Thurlow*, in *Pearson v. The Bank of England*, shortly reported ante, vol. ii. 529, but of which there is a very full and accurate note, 2 Cox, 175, his Lordship expressed his surprise, having always

conceived devises of stock to stand in the common situation of all specific legacies, and to be subject equally to the assent of the executor; and is reported to have observed, that on reading the acts, it seemed to him pretty clear, that the devise of stock was in the nature of a parliamentary appointment, and did not want the assent of the executor, and *Lord Eldon*, in the late case of *The Bank of England v. Turner*, 15 Ves. 578, observed, that he had always doubted whether the legislature, who meant to give a peculiar value to stock in the life of the party (it being declared that the stocks shall not be attached, sequestered, or taken in execution, and not being liable to debts in any way, except under a commission of bankruptcy), did not also mean that he should have the power of devising it, and that it should go to the devisee, not through the executor or administrator, but by the effect of the devise, and that it should go to the executor or administrator only, in default of the devise directed by that clause. In several cases bills have been filed against the bank by specific legatees, having partial interests in the stock, who having, by contract after the death of the testator, consolidated their interests, demanded a transfer. These demands have always been opposed by the bank, insisting that it cannot take notice of that contract, or permit a transfer, except according to the interests appearing upon the instrument. *Pearson v. The Bank of England*, cit. sup. *Austin v. The Bank of England*, 6 Ves. 522. *Marriot v. The Bank of England*, ib. 524. n. *Aynsworth v. The Bank of England*, ib. 525. n. So in *Hartga v. The*

The

*Bank of England*, 3 Ves. 55. and *Bank of England v. Parsons*, 5 Ves. Lord Rosslyn established, that a legacy is in trust, the bank compelled to take notice of the

execution of the trust, for if they look beyond the legal title, and take notice of the trusts of the will they must take notice throughout, and stand the consequence of resulting trusts.

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**BANK of  
ENGLAND  
v.  
MOFFAT.**

**SIMMONDS v. The Countess DU BARRE.**

Lincoln's-Inn  
Hall, 10th June.

HERE a foreigner puts in answer in his own language, a sworn translation must also be filed with it (a). Foreigner's answer.

(a) Vide *Lord Belmore v. Anderson*, post, vol. iv. 90.

**LAKE v. CAUSFIELD.**

Lincoln's-Inn  
Hall, 21st June.

R. Lloyd moved, that the Register for the bishoprick of Durham, might deliver to the plaintiff the original will of — Procktor, in order to its being produced here, he giving security to restore it; he cited 1 Atk. 627, and *Williams v. Floyer*, p. 343, which refers to several cases in which the same order had been made (b). Order on the Register of an Ecclesiastical Court to deliver an original will to be produced here, on security given to return it.

There are many other instances in books in which this has been done. *Morse v. Roach*, 1 Dick. 65. *Walker*, 2 Dick. 485. *Hodgkins*, 6 Ves. 135. *Ford v. Forder*, ib. 802. *Forder v. Wade*, post, p. 476. The Court has always expressed its surprise at the origin of the practice, and doubted the juris-

diction; and the Court of Exchequer, in *Wells v. Corbyn*, 3 Anstr. 648. refused to exercise it. In the case of *Fauquier v. Tynte*, 7 Ves. 292, Lord Eldon refused to act by analogy to it, in directing depositions in the French language to be delivered out for the purposes of translation.

## TRINITY TERM.

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WILLIAMS v. LAMBE.

Plea of purchase for valuable consideration, not good to a bill for dower.

**T**HIS was a bill for dower, stating that the plaintiff was lawfully married to *William Williams*, and continued his wife to the time of his death. That *William Williams* being seised of lands, &c. situated in *Delweyn*, in the county of *Hertford*, during the coverture in *February* 1783, sold the same to the defendant, who entered into possession of the same, and that *William Williams* died in *May* 1786, leaving the plaintiff his widow. The bill therefore prayed a discovery of the lands, and that defendant might assign to her one third part as her dower.

The defendant pleaded to the discovery and relief, that he was a purchaser of the estate, (subject to a mortgage) for valuable consideration, without notice of the vendor being married.

Mr. *Solicitor-General* and Mr. *Richards* argued—that this plea being to the relief as well as the discovery, was bad; that it admits that the defendant has the deeds in his possession, without which the plaintiff could not proceed at law, and the outstanding term which may be set up at law. That the plea is over-ruled by the answer, which gives the discovery which the plea sets up as a bar.

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Mr. *Mansfield*, in support of the plea, argued—that whether the defendant purchased the estate, subject to the mortgage or not, was immaterial to the present case; the plaintiff has a legal title, that she prays a discovery, and to have dower assigned; to this, the defendant pleads that he is a purchaser for a valuable consideration, without notice; and if so, he is within the protection of the Court, which will never aid a party against a purchaser for valuable consideration without notice of plaintiff's title. In cases where there are two equities, the first must prevail, notwithstanding the person who has the latter had not notice; but the Court will never aid a legal title against a purchaser without notice. The only question is, whether the case of dower is an exception to this general rule; but there is no case to prove that it is so: on the contrary, there are cases the other way, *Lady Radnor v. Vandebendy*, Show. Parl. Cases, 69. *Hill v. Adams*, 2 Atk. 208. The having notice or not makes no difference.

Mr.



Mr. *Solicitor-General*, in reply, said—that if a person purchases an estate with a satisfied term, that will bar dower; but if it is only a mortgage term, the widow may recover, and will have a right to redeem the mortgage.

*Lord Chancellor* said—the only question was, whether a plea of purchase without notice, would lie against a bill to set out dower: that he thought where the party is *pursuing a legal title*, as dower is, that plea does not apply, *it being only a bar to an equitable, not to a legal claim*: he therefore over-ruled the plea; though he said he could not see how the plaintiff could proceed without making the mortgagee a party, *as if it turned out that the mortgage (being in fee) was before the marriage, there would be an end to her title (a).*

(a) The cases upon this subject are contradictory, but the preponderance of authority is against the present case. *Rogers v. Seale*, 2 Freem. 84. of which there is but a very imperfect note, being the only other case in which it has been said, that this plea is a bar to the equitable and not to the legal title. In *Gerrard v. Saunders*, 2 Vcs. jun. 454, Lord Rosslyn expressed his opinion, that *Rogers v. Seale* could not be a decree of Lord Nottingham, and cited his memorable observation, that against a purchaser for valuable consideration without notice, this Court has no jurisdiction. In *Burlase v. Cook*, 2 Freem. 24, Lord Nottingham had previously held such a plea to be good against the legal title; and in *Basset v. Neworthy*, Finch, 102, his Lordship made a similar observation; that was a bill by an heir at law for a discovery of an alleged revocation of a will by his ancestor, to which the defendant pleaded another bill, brought in the Exchequer, for the same matter, dismissed after a full hearing; and also that he was a purchaser for valuable

consideration without notice. This plea having been over-ruled by Lord Keeper Bridgman, and several orders having been made; upon the cause coming on before Lord Nottingham, he discharged all the former orders, on the ground of the dismissal having been *without prejudice*, and then considered it merely as a plea of purchase for valuable consideration, and entered at large upon the subject; the concluding part of his Lordship's judgment, which has frequently been quoted, is peculiarly applicable to the present case: he said, that equity will not disarm a purchaser but assist him, and that precedents of this nature are very numerous, where the Court hath refused to give any assistance against a purchaser, either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another. *Parker v. Blythmore*, which is reported both in Pre. Ch. 58. and 2 Eq. Ab. 79. is another authority in favour of the validity of such a plea, vide *Medlicott v. O'Donnel*, 1 Ba. & Be. 171. and Sugd. Vend. & Purch. 667.

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*Ex parte APSEY*, in the Matter of ALLEN and Another,  
Bankrupts.

Two assignees of a bankrupt, one solvent the other bankrupt, with a partnership, to which he has advanced money which he had as assignee; the solvent assignee cannot prove this debt under the joint commission, there being no contract with him.

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ON the 11th February, 1790, a commission of bankruptcy issued against *William Tory*, and the petitioner and *Edward Allen* were chosen assignees. And in April last, a joint commission of bankruptcy issued against *James Allen* and *Edward Allen*, under which *Lester* and *Hyde* were appointed assignees. *Edward Allen*, before this latter commission, and as one of the assignees of *Tory*, received several sums of money, part of his estate, and paid several sums on that account; but at the time of the bankruptcy, *Edward Allen* was indebted to the estate of *Tory*, £432. 17s. 6d. which he had paid and applied in discharge of debts due from him and *James Allen*, and otherwise, in the joint trade. The petitioner applied to the commissioners to permit him to prove this sum of £432. 17s. 6d., under the joint commission, against the partnership, and the same being refused, presented this petition to the Lord Chancellor, praying to be at liberty so to do.

Mr. *Brown*, in support of the petition, cited the cases of *Boardman v. Mosman*, (ante, vol. i. p. 68.) and *Ex parte Clowes*, (ante, vol. ii. p. 595.)

Lord Chancellor said—in the latter of these cases, the partners had agreed to consolidate the separate debts, which made the difference. Here one, by abusing his trust, advances the money to the partnership, that will not raise a contract between the partnership, and the person whose money it is, and

*Refused the Petition (a).*

(a) So where money was borrowed by one partner to pay for an estate, but applied by him to pay partnership debts, it was held that the lender could not prove against the joint estate. *Ex parte Wheatly*, Co. B. L. 508. ed. 7. The liability of the firm in these cases depends on the knowledge the other members have of its being trust-money, *Smith v. Jameson*, 3 T. R. 601. *Ex parte Watson*, 2 Ves. & Bea. 414. and vide *Emly v. Lye*, 15 East, 7. Where the joint estate had lent money to the separate estate of one partner, or if one partner had lent to the joint estate, it was determined by Lord Hardwicke, upon great consideration, *Ex parte Hunter*, 1 Atk. 223. Co. B. L. 502. ed. 7. and seems also to have been previously the opinion of Lord Talbot *Ex parte Blake*, Co. B. L. 503. ed. 7. that proof might be made by the one or the other. But in

*Ex parte Batson*, Co. B. L. 535. ed. 7. and in the case of *Lodge v. Fendal*, 1 Ves. jun. 166. which immediately followed it, Lord Thurlow decided that such proof could not be made: the individual partner cannot prove in competition with the joint creditors, nor the partners in competition with the separate creditors. To make out the right to prove by the one estate or the other, it must be established, that the effects, joint or separate, have been acquired under circumstances from which the law implies fraud. *Ex parte Harris*, 2 Ves. & Bea. 211. 1 Rose, 329. and 437. *Ex parte Yonge*, 3 Ves. & Bea. 35, and the cases there cited. As to the application of the same principle to the right of creditors to interest, in case of a surplus, vide the cases cited in the Editor's note to *Ex parte Champion*, post, 456.

JOHNSON

## JOHNSON v. CURTIS.

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**A** BILL to open an account which had been settled between the defendant and plaintiff's testator, with the common reservation of "errors excepted," and the balance carried over to a new account. The bill only stated generally, that there were errors in the account, but did not specify the errors; on which account the bill was dismissed at the Rolls.

Bill to open a settled account must state specific errors, not generally that it is erroneous.

Upon an appeal to *Lord Chancellor*,—*Mr. Solicitor-General* and *Mr. Lloyd*, in support of the decree, insisted it was necessary to state specific errors; for that, otherwise, the defendant must be prepared to prove every item in his account; as it would be impossible for him to know what the plaintiff would impeach, and cited *Dawson v. Dawson*, 1 Atk. 1.

*Mr. Mitford* insisted—if an action had been brought by the defendant, the plaintiffs might have shewn an error, notwithstanding the reservation of "errors excepted."

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*Lord Chancellor* said—the expression "errors excepted," did not prevent its being a settled account; and the balance being carried over, shewed it was so: and therefore the errors should have been pointed out: and affirmed the decree (a).

(a) The cases on this subject are collected in a note to *Taylor v. Haylin*, ante, vol. ii. 310.

## CONWAY v. CONWAY.

**BY** settlement made 23d August, 1744, upon the marriage of *John Conway* with *Margaret* his wife, certain lands in the county of *Anglesea* were conveyed to trustees, to the use of *John Conway* and *Margaret* his wife, and the survivor of them, for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to trustees for a term of two hundred years; remainder to the first son of the marriage; with *livers* remainders over. And the trusts of the term were declared to be, that the trustees, or the survivor, or the executors of such survivor, might, out of rents and profits, or by demise or sale hereof, raise a sum of £1,000 for the portion of any daughter or daughters, younger son or sons of the marriage, as should, by virtue of the limitations aforesaid, not be immediately inheritable to the said premises, or any part thereof, to be paid to such daughter, &c. (not immediately inheritable as aforesaid), at such time or times,

The portions charged on a reversionary fund, shall not, in general, be raised till the term comes into possession; yet when it is expressly directed, under a power, that they shall be raised as soon as [conveniently] may be, they shall bear interest from the death of testator.

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*and in such manner and proportions as the said John Conway, by any deed, &c. or last will, attested as therein mentioned, should direct or appoint, and in default of such appointment, then the sum of £1,000 to be paid within six calendar months next after the decease of the survivor of them the said John Conway and Margaret his wife, to and among such daughters, &c. share and share alike.*

*John Conway* died in 1766, in the life-time of his wife, having made his will, pursuant to the power, whereby, after several other devises, he devised as follows, "lastly, as to the power of charge I have to dispose of upon my estate by marriage settlement, and also the £1,200 upon my said purchased estates, devised to trustees as aforesaid; all these sums, being £1,000, by settlement, and £1,200, upon my purchased estates, I devise and wish my said trustees, as soon as it can conveniently be done, will divide among all my younger children, share and share alike, (I mean by such, all of them that do not inherit my real estate, or have a right so to do), upon the decease of my wife."

*John Conway*, at the time of his death, left *Margaret*, his widow; *John Maurice Conway*, his eldest son, and heir at law; the plaintiffs *Robert*, *Catharine*, *Margaret*, and *Jane*; also *Mary Conway*, *Susannah Conway*, and *Harriet Conway*, his younger children, by the said *Margaret*, his wife.

*Mary Conway*, in the life-time of her mother, intermarried with *Thomas Edwards*, one of the defendants, and died also in the life-time of the mother; *Susannah* intermarried with *John Lloyd*, and they are defendants.

*Harriet Conway* died in the year 1784, in the life-time of her mother; having, when of age, made her will, and her mother executrix thereof.

*Robert Conway* had attained his age of twenty-one years, and assigned his share of the £1,000 to his mother.

*Margaret*, the widow, died December 1786, having made her will, and appointed her daughters, the plaintiffs, executrices, who were also the representatives of *Harriet Conway*.

Plaintiffs' bill charged, that their portions were vested interests, at the time of the decease of their father *John Conway*, and that they are entitled to interest for the same from the time of his death; that *Harriet Conway* and *Mary Edwards* who died in the life-time of *Margaret Conway* (surviving her husband) took transmissible interests, and the plaintiffs prayed that it might be declared accordingly.

An objection was taken at the hearing by Mr. *Lloyd*, that the trustees of the charge of £1,200, upon the purchased estate, who were to make the division of the £1,000, were not before the Court, although the trustees of the term were.

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But

But Mr. *Mansfield* insisted, that they were not necessary parties, being wholly uninterested, and that the testator had not appointed to them.

Lord Chancellor said, if he was obliged to take any notice of the £1,200, he could not go on without them and the personal representative; but, though the will had words referable to them, their concurrence was not necessary.

Mr. *Mansfield*, for the plaintiffs.—The plaintiffs claim, under the will, their shares of the £1,000, with interest from the death of their father *John Conway*.—Their right depends on the words of the will, in which the testator has used words that manifestly indicate his intention, that the division should be made as soon as possible, which could not mean that it should be postponed to the death of the wife. The words must bear their natural sense, and there is nothing in the subsequent words to contradict it.

Mr. *Lloyd* and Mr. *Abbot* for the defendants.—This is a case of great consequence, in point of principle, though the value in the present instance is but small. This was a settlement of the wife's estate, of which she was seised in fee, upon the husband for life; remainder to the wife for life; remainder to the first son of the marriage, who had no provision during the life of the mother; and the children, at the death of the father, were very young. It has always been the course of the Court, not to raise portions for children where they have died young, even if the portions were to be paid at twenty-one or marriage. It could not be the intention of the testator that the portion should be raised for a child of three or four years old, and that he might file a bill to have the sum raised, though he might afterwards die in the life-time of the wife. No case of this sort has come before the Court, because in these cases, the portions are, generally, raisable at twenty-one or marriage; but, certainly, here the children were intended to be in the parent's power. The Court is very averse to raising portions upon reversionary terms, because it would be the destruction of family estates; and therefore, in *Sterens v. Dethick*, 3 Atk. 39, Lord *Hardwicke* refused to raise it in the life-time of the surviving parent. Here the death of the wife was, manifestly, in contemplation. The words, "I mean by *such*, all of them who shall not inherit," render the whole contingent, as it would be impossible to ascertain, till the death of the wife, who would be the younger children. In the mean time the younger son might become the elder, and proprietor of the estate; and the Court would never raise it for him, whilst a younger son had the chance of getting it back from him, if he should become the eldest. And that argument applies to all the plaintiffs; as it was in contemplation,

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plation, at the time of making the settlement, that no part of this £1,000 should go to the owner of the estate; and the testator could not mean that it should be raised during the life of the widow, who would take the whole profits for her life, and the son would have no provision. In *Reresby v. Newland*, 2 P. W. 93, Lord *Macclesfield* said, he would not go a jot further than had been gone before, and refused to raise a portion upon a reversionary term. In *Brown v. Berkeley*, Eq. Abr. 340, the same thing was determined. It is necessary there should be a very clear intention to do such an act of violence to the estate; and the intention here was, that it should not be paid till six months after her death; at least such confused words as these do not shew any intent to raise it sooner than it conveniently might be, after the mother's death. The true construction is, that the £1,000 should be raised at the death of the wife, and then, interest will only be payable from her death; and those children who died in her lifetime, will not be entitled.

Mr. *Solicitor-General* and Mr. *Alexander*, (for the defendant in the same interests with the plaintiffs, being the representatives of *Mary*, who had married, and died) observed, that the construction contended for by Mr. *Lloyd*, would be just the same as if the testator had died intestate; in which case, the children would have taken their portions six months after the death of the wife; or at most, would only make those six months difference, by vesting the portions at the death of the mother. In fact, the daughter who married, and died, stood in need of her portion. The description is merely the same as younger children; that has never prevented the portions from vesting; the case of *Lord Teynham v. Webb*, 2 Ves. 189, shews that the portion would have vested, though it might be liable to be divested.

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*Lord Chancellor*. Where a man gives portions, charged on a term to arise upon the death of a party, it shews that they are not to be paid till after the death of that party, and that though it be upon attaining twenty-one or marriage, yet that it can only be where the term shall come into existence (a). One would go as far

(a) Lord *Eldon* has remarked, 6 Ves. 379, upon this passage, that upon looking to his own brief in this cause, and to other cases, he was satisfied that Lord *Thurlow* never did express himself in the words here attributed to him. Such doctrine being contrary to that of Lord *Cowper*, Lord *Hardwicke*, and all the cases. The determinations which preceded the present, to which may be added *Verney v. Earl Verney*, 3 Eden, 26, are collected, 3 Fonb. on Eq. 199, in Mr. *Vesey's* note to the *Earl*

of *Albemarle v. Rogers*, 2 Ves. 481. and Mr. *Cox's* note to *Butler v. Duncombe*, 1 P. W. 453. in the latter of which, it has been very correctly observed, that judges in later times have anxiously sought for circumstances to distinguish the modern cases from the early determinations in which portions were raised out of reversionary terms. Et vide Lord *Northington's* observations in *Cholmondeley v. Meyrick*, 1 Eden, 85. Lord *Alvanley* also, in the case of *Lady Clinton v. Lord Robert Seymour*, 4 Ves. 460,



far as might be, upon the rule not to press estates; but still such an intention can never be raised against express declaration. Here, the settlement foresaw that, during the life of the wife, the husband might die, and it might be necessary to make a provision for children, and it was intended to enable him, in his life-time, or after his death, to advance the provision, and that it certainly was to arise after the death of the wife: when the original settlement foresaw this case, it is in vain for me to say, that it is contrary to the intention of the settlors that the estate shall be pressed. Then the question is, whether he meant to execute it short of the power; but I think it is clear he meant to execute his whole power: probably, had it been suggested to him, that by executing it thus, the provision might, in events, be to be raised for other persons than his children, he might have used some words to controul it. With respect to the value, the construction must be the same as if it was only one year's produce of the estate. It does appear he meant to execute his whole power, I should say this, if the £1,000 only was in question; but it receives additional strength from the £1,200 being given in the same way; I allow this came from a different fund, but the frame of the gift applies to both, and the £1,200 was necessarily to be raised upon his death; this therefore must necessarily be raised.

*Decreed for plaintiffs.*

460, considered it clearly established by the more modern cases, that the Court will lay hold of any words from which it could be fairly inferred that it was not the intention to charge a reversionary term with raising portions in that manner, and that if upon the context of the settlement, any thing could be collected by which it might appear that it could not be the intention of the parties to raise them in that way, the Court was extremely eager to lay hold of that.

These cases afterwards received a full and elaborate discussion in *Codrington v. Lord Foley*, 6 Ves. 364. in which Lord Eldon, in a most luminous judgment, declared the proper rule to be that stated by Lord Talbot, in *Hebbelthwaite v. Cartwright*, Forr. 32. that the raising or not raising, must depend upon the particular penning of the trust, and the intention of the parties to the instrument, taking it to be *prima facie* the intention upon the general rule, if there is nothing more than a limitation to the parent for life, with a term to raise portions at the age of twenty-one or marriage, if

there is nothing more, and the interests are vested, and the contingencies have happened at which the portions are to be paid, the interest is payable, and the portions must be raised in the only manner in which they can be raised, that is, by mortgage or sale of the reversionary term. His Lordship did not think that the Court ought to be eager to lay hold of circumstances; the Court ought to hold an equal mind while construing the instrument, and he could not agree with what is said in *Stanley v. Stanley*, 1 Atk. 549. that very small grounds were sufficient, if they are sufficient to denote the intention, they are not small grounds; if they are not sufficient, the Court does not act according to its duty in treating them sufficient, thereby disappointing the true intention of the instrument. In the subsequent case of *Lyddon v. Lyddon*, 14 Ves. 566, Sir W. Grant seemed to think, that if it had been necessary to determine the question, the general words there used might have warranted the raising of maintenance by sale or mortgage of a reversion.

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## LOWSON v. LOWSON.

(Upon exceptions to the Master's Report.)

Where testator refers to a power, but does not legally execute it, but has other estates, to which the will can apply, the defect of the execution cannot be supplied: though where he could not make the gift but by virtue of the power, he shall be supposed to have intended to execute it, and therefore the defect shall be supplied.

**F**RANCIS LOWSON and *Mary* his wife were seised in fees of copyhold estates, held of the manors of *Bondgate*, in *Darlington* and *Evenwood*, in the county of *Durham*, and being so seised, surrendered the same to *Edmund Lowson*, brother of *Francis*, in trust, to the use of *Francis* for life, remainder to *Mary* for life, remainder to the heirs of their bodies, remainder to the right heirs of the survivor of them, with a power to *Francis* and *Mary*, by deed, to revoke, and appoint new uses.

By indenture dated 1st *March*, 1742, duly executed under the power, *Francis* and *Mary* revoked the old uses, and appointed the estates in trust for *Francis*, for life, remainder to *Mary* for life, *provided she should so long continue his widow*, and after the decease of the survivor, in trust, for such uses, &c. as *Francis* should, by his last will, or by any deed, &c. appoint, of and concerning the same, to and amongst the children of the said *Francis Lowson*, by the said *Mary* his wife, and the estate was to be charged with an annuity of £20 a-year for *Mary*, if she should marry again; and there was a proviso, enabling *Francis* and *Mary* to vary the uses, by any subsequent deed; but no such deed ever was executed.

*Francis Lowson* was seised of other copyhold estates, held of the same manors, which were (according to the custom of the manors) surrendered to trustees, to the use of his (*Francis's*) will. He also, after the deed, purchased other copyhold estates, which were surrendered in like manner, and was also, at the time of making his will, seised of freehold and of other copyhold estates.

*Francis Lowson* made his will, dated 14th *September*, 1763, duly executed to pass real estate, and agreeable to the deed of 1st *March*, 1742, and in pursuance of the power; and thereby, reciting that he had surrendered his copyhold to trustees to the use of his will, devised the same to his wife *Mary Lowson* and others, as trustees, in trust for the several uses therein contained, subject nevertheless to the estate thereafter directed to his wife, of his messuage and malting, with their appurtenances then in his possession, situate in *Bondgate*, in *Darlington* aforesaid, also to her claim, forth, and out of her own estate, by virtue of the said settlement made thereof after marriage, in trust, that his trustees, or the survivors, &c. should, by and out of the rents and profits of the premises, or by sale or mortgage, raise and pay to his sons (enumerating them) and to his grandson *Wardale Lowson*, £500 each,

each, as they should attain the age of twenty-one, with interest from his death, also to raise £300 among his children, or his grandson *Francis Perking*, as his wife should appoint, then to permit his wife to take the rents for life, and after her decease, to pay an annuity to his eldest son *Francis*, and, subject thereto, to his second son *Newby*, for life, remainder to his first and other sons in tail male, with remainders over.

The bill was filed to establish this will, and for other purposes.

The defendant *Young Lowson*, by his answer, insisted that this will was not a good execution of the power.

At the hearing, it was referred to the Master to take the several accounts, and, among other things, to enquire as to the customs of the manors, and whether the will passed the estates comprized in the settlement. The Master had reported, that the will passed the estate in the settlement.

To this report, exceptions were taken.

*Mr. Solicitor-General*, in support of the exception, contended, that the will was not intended to pass the copyhold comprized in the settlement, and which was the subject of the power. If the words of the will can be satisfied by other property, the Court will not presume the testator meant to execute his power. He has given the property to persons who are not the objects of the power, which is confined to children, whereas he has given the inheritance to his grandson, and has excluded one of his sons, *Francis*, (to whom he has only given an annuity) who, according to the power, could not be excluded.

*Mr. Mansfield*, *Mr. Lloyd*, and *Mr. Ray*, contended, in support of the Master's report, that the will intended to pass the estates, which were the subject of the power. The testator, in the beginning of the will, refers to the power, which could apply to no other estates, he makes his will in "pursuance of the power," he could not have used the words "subject to the estates therein after devised to his wife," had he meant any estates, but those which were the subject of the power. He certainly must have had these estates in contemplation, though he speaks of them as his own estates.

*Lord Chancellor* said, that general words of gift will apply to a power, where the testator could not give the property, otherwise than by virtue of the power, but words of gift do not, in general, apply to the execution of a power. In the beginning of this will, the testator means to dispose of his *own* estates, in opposition to his wife's, which he calls her *own* estates, which contrasts the two. If he meant this as an execution of his power, he must have supposed the power extended to a disposition to grand-

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grand-children. If this was to be held an execution of the power, it would be beyond any of the cases (a).

*Exception allowed.*

(a) The doctrine upon this subject is collected in a note to *Andrews v. Emmott*, ante, vol. ii. 297.

Rolls,  
11th July.

FREKE v. Lord BARRINGTON and Others.

By settlement of 1712, a house called *B.* part of the manor of *H.* was settled upon the settlor's nephew for life, remainder to the first and other sons in tail, with divers remainders over. By indenture in 1722, the brother of the settlor settled the remainder of the manor upon his son (nephew of the first settlor), for life, [ 275 ] remainder to *W.* his first son, (then born) for life; remainder to his first and other sons in tail male; and a term was created by this deed to raise £4,000 for the daughters of *W.* and there was a proviso in the deed, that in case *W.* or such one who should come into possession of the manor should, within seven years, convey *B.* to the same uses as the manor was limited, he should have a power of making a jointure; but if he should refuse or neglect so to do, *all the uses limited of the manor, subsequent to his estate for life, should cease*; there was also a proviso by which *W.* was entitled to make leases, for the benefit of his daughters or younger sons.

*W. F.* the grandson, took possession of *B.* and afterwards of the manor, and lived several years, but did not settle *B.* to the uses of the deed of 1722, but suffered a recovery of it, and disposed of it by will; and did not execute the power of jointuring, but charged the term with £4,000 for his daughters, and executed the power of leasing for their benefit.

The bill was to have *B.* conveyed to the uses of the deed of 1722, or to have the leases declared void, and the execution of the power bad; or for a compensation to the amount of the charges on the manor of *H.*

His Honour held, that this was not a case of election; and that, as upon neglect of settling *B.* to the same uses, only the estate subsequent to *W.*'s estate for life were made void, and the powers (though subsequent in the order of the deed) were annexed to the estate for life, the execution thereof ought not to be set aside.

a year

a year to the said *Elizabeth*, wife of *Thomas Freke*, for life, and; subject thereto, to said *Thomas Freke* in tail, remainder to *William Freke* in tail, remainder to *Rauffe Freke* for life, *sans waste*; remainder to trustees to preserve, &c.; remainder to his first and other sons in tail male: and as to all the premises, after the several uses before declared, to *William Freke*, in tail general, remainder to the right heirs of *Rauffe Freke*; and the trusts of the five hundred years term were to raise portions for the younger children of the marriage, to raise £2,000 if but one such younger child, and £3,000 if two or more, equally to be divided: and the trusts of the one thousand years term, were for purposes which never took effect.

The fine and recovery were levied, and suffered, and in 1721 *Thomas Freke* died without issue; whereby *William Freke* became tenant in tail in possession of the manor, &c. of *Hunnington*.

By lease and release, dated 17th and 18th October, 1722, between *William Freke*, of the first part, *Thomas Harris* and *John Higham*, of the second part, *Henry Freke* and *John Hipplesly*, of the third part; *William Freke* conveyed the manor of *Hunnington* (except *Batson's*), to make them tenants to the *præcipe* in a common recovery, to enure to the use of said *William Freke* for life, *sans waste*; remainder to trustees for five hundred years, and subject thereto to the use of *Rauffe Freke* for life, *sans waste*, remainder to trustees to preserve, &c. remainder to *William Freke*, son of said *Rauffe Freke*, and grandson of said *William Freke*, for life, remainder to trustees to preserve, &c.; remainder to first and other sons of *William Freke* the grandson, in tail male; remainder to the second and other sons of *Rauffe Freke*, in tail male; remainder to *Thomas*, another son of *William Freke*, party thereto, in tail male; remainder to *John*, another son of *William Freke*, party thereto, for life, *sans waste* (who was the father of the plaintiff), remainder to trustees to preserve, &c.; remainder to his first and other sons in tail male; with like remainders to *Robert Freke*, another son of *William Freke*, for life, and his first and other sons in tail male; remainder to the right heirs of *Rauffe Freke*: and the trusts of the five hundred years term were declared to be, that the trustees, or the survivor of them, or the executors, &c. of such survivor, should raise and pay any sum not exceeding £2,000, for the benefit of the younger children of the said *William Freke*, or for such purposes as he should, by deed, appoint; and on further trusts, to raise and pay any sum not exceeding £3,000, for the daughters and younger children of said *Rauffe Freke*, son of said *William*, in such proportions, manner, and form, as the said *Rauffe Freke*, by deed or will, executed in presence of three witnesses, should appoint; and for want of such direction, only £2,000 should be raised out of the term for said younger children, equally to be divided between them: And the term was declared to

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to be on further trust, to raise a sum not exceeding £4,000, for the daughters and younger sons of *William Freke*, the grandson, in such proportions, manner, and form, after the death of *William Freke*, party thereto, and *Rauffe Freke*, either in the life-time, or after the death of said *William Freke*, the grandson, as he should, by deed or will, executed and attested by three witnesses, direct or appoint; and for want of such direction or appointment, then only £3,000 should be raised, equally between them. In which said indenture of release, is a proviso, "that in case said *William Freke*, the grandson of said *William Freke* (or his elder or only son, in case of his death), or such other son of *Rauffe Freke*, son of said *William Freke*, in case of the death of *William Freke* the grandson, and all the issue male of his body, or, in case of his death without issue male, the person who shall, for the time being, be the elder or only son of *Rauffe Freke*, son of said *William Freke*, and who shall live and come first to, and attain twenty-one years, and be entitled to the possession and freehold, or a greater estate, of and in the said manor, &c. so released and confirmed by virtue of the limitations thereinbefore contained, should, within seven years after attaining that age, in case said *Rauffe Freke* and *Anne* his wife should both of them die within that time, otherwise, as soon as legally and effectually could be done, after the death of the said *Rauffe Freke*, son of said *William Freke*, and *Anne* his wife, and the death of the survivor, by good, valid, and effectual conveyances and assurances, to the good liking of the said *Thomas Freke*, son of *William Freke*, or such other son or sons, or grandsons of said *William Freke*, or such other person or persons, to whom said manor, &c. thereby intended to be released, immediately before the execution of said indenture, stood limited, and would have descended in case said *Rauffe Freke*, son of said *William*, and *Anne*, were both dead without issue; well and sufficiently convey and assure all said excepted premises so limited in jointure to said *Anne* for her life, as aforesaid (*viz.* the estate called *Batson's*, &c.), to such and the same uses, or as near thereto as might be, as the said manor, &c. stood thereby limited unto, subsequent to, and in remainder after the estate hereinbefore limited to said *Rauffe Freke*, son of said *William Freke*, the grandfather, for the life of said *Rauffe Freke*, and should at the same time deliver one or more parts of such conveyances to said *Thomas Freke*, son of said *William*, or such other younger son, or grandson of said *William Freke*, or such other person to whom said manor, &c. immediately before the execution of these presents, stood limited, and would have descended in case said *Rauffe Freke*, son of said *William*, and *Anne Freke*, were both dead without issue; then it should be lawful for the said *William Freke* the grandson, &c. after making and creating such conveyances of the said excepted premises as aforesaid, to limit any part of the premises by way of jointure for any woman he should



should marry, not exceeding £100 for every £1,000 he should receive for a portion. Provided also, that in case the said *William Freke*, the grandson of said *William Freke*, or his elder or only son (in case of his death), or such other son of said *William Freke*, in case of the death of said *William* the grandson, and all his issue male, and in case of his death without issue male, who should, for the time being, be elder or only son of said *Rauffe Freke*, and who should come first to, and attain twenty-one years, and be entitled to the possession and freehold, or a greater estate, of and in the said manor, &c. by virtue of the limitations therein contained, should, for seven years after he or they, or such of them as should live to twenty-one, and be entitled as aforesaid, should *refuse or neglect*, by good conveyances, to the approbation of said *Thomas Freke*, son of said *William*, or such other son or sons, or grandsons of said *William Freke*, or such other person to whom said manor, &c. stood limited, and would have descended in case *Rauffe Freke*, son of said *William*, and *Anne*, were both dead without issue male, to settle and convey all said thereinbefore excepted premises so limited in jointure to said *Anne* for her life, to such and the same uses, or as near thereto as might be, as said manor, &c. thereinbefore mentioned to be thereby released, were and stood limited unto, subsequent, and in remainder after the estates thereby limited, to said *Rauffe Freke*, for the life of the said *Rauffe Freke*, and to deliver one or more part or parts of such conveyances, to said *Thomas Freke*, son of said *William*, as to such other younger son or sons, or grandsons of said *William Freke*; or to such other person to whom said manor, &c. immediately before the execution thereof, stood limited, and would have descended in case said *Rauffe Freke* and *Anne* his wife were both dead without issue male; or in case said *William Freke*, the grandson, should make a jointure to any wife out of said manor, &c. or any part thereof, for more than £100 *per annum* for every £1,000 he should receive as a marriage portion, or should not apply and pay such portion or portions, in discharge of the monies to be by the said *William Freke*, or the said *Rauffe* his son, directed to be raised by virtue thereof, by and out of the said term of 500 years, or so much of the said marriage portion as would be sufficient to discharge the same; then and from thenceforth all and every the uses, estates, limitations, and appointments, therein and thereby before limited or appointed, of said manor, &c. which were and was subsequent to, and in remainder after, the estate thereinbefore limited, to the use of said *William Freke*, the grandson, for his life, should cease and determine; and in such case, said manor, &c. should immediately after the death of *William Freke*, the grandson, and determination of the estates and uses thereby limited and appointed, which were precedent thereto, remain and be limited to the use of such person or persons, and for such estates, &c. as the said manor, &c. immediately before the execution thereof,

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of, stood limited, and would have descended, in case the said *Rauffe Freke* and *Ann* his wife were both dead without issue male." There was also a proviso, that *William Freke* might, at all times during his life, make any leases of such of the premises as were or had been leased for lives, to all, every, or any of the daughters or younger sons of the said *William Freke*, the grandson, or any person or persons he should think fit, for three lives, or for any number of years determinable upon three lives, with or without impeachment of waste, so as the usual and accustomed rent should be reserved. It was also made lawful to the persons who should be in possession, to make leases of the copyhold.

By virtue of this indenture, *William Freke* entered and enjoyed the manor of *Hannington* for life, and *Rauffe Freke*, during the life of his father, held and enjoyed *Batson's* house, mentioned in the indenture of 1712, and excepted in the indenture of 1722, and upon the death of his father, also entered upon and enjoyed the manor of *Hannington* till his death. *Anne*, wife of *Rauffe Freke*, died in his life-time, and he died about 1757 intestate, leaving *William*, his only son, and four daughters.

*William Freke*, the grandson, entered, and took possession of *Batson's*, in the indenture of 1712 mentioned, and excepted in that of 1722, and also, by virtue of the said deed, entered upon the said manor of *Hannington*, and enjoyed the same till his death in 1782, but did not comply with the terms in these deeds, of settling *Batson's* to the uses in that deed, but suffered a recovery of *Batson's*, and declared the use thereof to be to himself in fee.

*William Freke*, the grandson, by deed of appointment, dated 19th February, 1782, charged the term of five hundred years, with payment of £4,000, with interest at £5 per cent., to his two daughters *Mury* and *Fanny*, at their ages of twenty-one or marriage, with benefit of survivorship.

*William* died in November, 1782, without legitimate issue male, leaving said *Mury* and *Fanny*, and an illegitimate son, *Knightly Freke*.

*Thomas*, second son of *William Freke*, the grandson, died in January, 1768, without issue: and *John*, the next son of said *William*, died in September, 1761, leaving plaintiff his only son, and by death of *Rauffe Freke* without issue male, plaintiff became tenant in tail in possession of the manor of *Hannington*, and is now in possession thereof.

*William Freke*, the grandson, made his will, and after charging his real and personal estate with payment of his debts, devised the lands in *Hannington*, which were settled upon his late mother as a jointure (and which plaintiffs charged to be *Batson's*), to Lord *Barrington* and others, for five hundred years, in trust, by sale or mortgage, to raise £1,000 for each of his daughters at twenty-

twenty-one, with maintenance in the mean time; he gave the residue of the rents of the estate to his wife during widowhood, and if she married again, only one-third for life, and after the determination of the term, he gave the premises to his son, *Knightly Freke*, for life, with remainder to trustees, and remainder to his first and other sons.

While *William Freke*, the grandson, was in possession of the estate of *Hannington*, he granted several leases to *William Cole*, for the lives of *Knightly Freke*, *Mary* and *Fanny Freke*, at low rents and nominal fines, in trust for his said children.

The plaintiff, as next tenant in tail, filed the present bill, claiming *Batson's* in specie, and demanding to have *Batson's* conveyed to the use of the deed of 1722 (upon the principle of election), or to have the leases declared void, and the execution of the powers bad, or to have a compensation to the amount, in value, of the charges and the leases made upon *Hannington* estate.

*Mr. Lloyd* and *Mr. Cor*, for the plaintiff, insisted, that this was a case of election; that the deed of 1722, imposed a condition upon *William*, the grandson, to settle *Batson's*, for the purpose of uniting that estate with *Hannington*, limiting both in the male line, with remainder over to the plaintiff.

That *William* had taken the whole on that condition, and by taking it, had acquiesced therein, and had bound himself to perform it; that not having performed it himself, the defendants, as volunteers, are bound to perform it now; and should therefore convey *Batson's* to the plaintiff, according to the limitations of the deed of 1722, or *cy pres*; that *William*, the grandson, had in fact elected to take, appeared clearly from the execution of the appointment of 1782, reciting the power given him by the deed of 1722, and that he could not elect to take the benefit, without taking the burthen. But that if there was any doubt whether he knew that he was bound, or that he meant to bind himself by accepting the benefit, to convey *Batson's*, though this might relieve *Batson's* from any specific lien, yet that the charges made upon the *Hannington* estate ought to be transferred to *Batson's*, or that compensation ought to be made out of the assets real or personal of *William*, the grandson, to the plaintiff, for the charges thrown upon *Hannington*, by the leases and portions, contrary to the intention of *William*, the grandfather, and contrary to the equity of the case. They cited *Streatfield v. Streatfield*, Forr. 176; *Earl of Northumberland v. Earl of Aylesford*, Amb. 540 (a); *Frank v. Standish*, (ante, vol. i. p. 588, n.); *Starkey v. Starkey*, 10th June, 1777, before Lord Bathurst; *Lord Beaulieu v. Lord Cardigan*, 6 Bro. P. C. 232, which they said was disapproved by Lord Thurlow (b).

(a) 1 Eden, 489, nom. *Earl of Northumberland v. Marquis of Granby*.

(b) As to this, see the Editor's note to the above case of the Earl of North-

*umberland v. Marquis of Granby*, and *Buttrick v. Broadhurst*, ante, 88. acc. *Wake v. Wake*, 1 Ves. jun. 335.

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That

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That if it was to be considered as a case of condition, and not of election, that the intention of the deed was, that the charges should not take place; for that though they were charged upon a term, which was created prior to *William's* estate for life, yet not being raisable till after the death of *William*, the grandson, the charge must be considered as an use subsequent to the life estate.

Mr. Mitford, Mr. Graham, Mr. Simeon, and Mr. King, for the defendants, insisted, that this was a plain conditional limitation of *Hannington* estate to *William*, the grandson, and his issue male, upon condition of *William* suffering a recovery of, and settling *Batson's* within seven years; but on non-performance of that condition, *William* was to have no power of jointuring, and the estate was to go, after the death of *William*, to the plaintiff, or such person as would have been entitled in case *William* had been dead without issue male.

That it could not be a question of election, because in all cases of that kind, though a condition was expressed or implied, *no forfeiture or alternative is expressed*; on which ground it is, that the party electing, or some one claiming under him, must do the thing, or make recompence for not doing it.

But in cases of condition, the penalty on non-performance of the condition is specified, and in cases of conditional limitation, the estate given upon the condition is limited over on non-performance.

That all the cases cited, except that of *Lord Beauchieu v. Lord Cardigan*, were clear cases of election, and that case was a clear conditional limitation the estate being limited over upon default of the devisee's settling the estate within a limited time, which was never done. For which reason the House of Lords reversed Lord *Northington's* decree: and that in *Butricke v. Broadhurst*, (ante, p. 88,) it did not appear that Lord *Thurlow* had disapproved of the decision in the House of Lords.

That the leases were all made pursuant to the powers; and if not, they ought to bring ejectments, and try the question at law.

That the charge of the £4,000 was made by deed, in the lifetime of *William*, the grandson, though not raisable till after his death, and that if *William* had had a son, tenant in tail, and they had suffered a recovery, it would have let in the charge as prior to the life-estate of *William*; that this was not only the letter, but the spirit of the deed; for the objects of the deed of 1722, were twofold and distinct, the one to provide for the younger children of *Rauffe*, and *William*, the grandson, at all events, the other to unite the two estates in the male line: the latter to be enforced by taking away the contingent power of jointuring, and the continuance of the estate in the male line of *William* the grand-

That a contrary construction would lead to this absurdity, that *William*, the breaker of the condition, might keep the estate for his life, though he should live forty or fifty years beyond the seven years limited for settling *Batson's* (which by the deed of 1722, he ought clearly to do), and yet the portions of the younger children of *William* would be forfeited; not only so, but the portions of the children of *Rauffe* would also be forfeited, though they were directed to be paid after the death of *Rauffe* and his wife. That they were charged on the same term with the portions to the children of *William*, and that there was a power given to raise the portions of *William's* younger children in *his* life, if he should so choose. That it was not probable *William*, the grandfather, should mean to defeat them, as charges subsequent to *William's* life estate, when he had given a power to raise them in *William's* life-time, had charged them upon a term prior, and had at all events given them £3,000, charged upon that term, in case *William* should not execute his power to charge £4,000.

That if *William*, the grandson, had left issue male, it would be very extraordinary for the plaintiff not only to demand *Hannington* as forfeited, but also *Batson's*, where the express condition was, that only *Hannington* should go over; and that the accident of *William's* leaving no issue male, which had drawn the sting of the condition, should make any difference in the construction of the proviso in the deed of 1722. If the condition became impotent, it was not the fault of *William*, the grandson.

That as to the having elected (supposing it a case of election) there was no evidence of it; for the execution of the power given by the deed of 1722, might be, and in fact was, under a conviction that he had a right to charge, without subjecting any thing but the estates subsequent to the life interest, to forfeiture, for not conveying pursuant to the deed of 1722.

That as to compensation, none was due, for *William*, the grandson, had done no more than he had a right to do.

This day his Honour gave judgment.

The Master of the Rolls stated the case, and went on to the following effect:—The bill insists, that *William*, who was tenant in tail of *Batson's*, should make an election of *Hannington*, or renounce all advantage under the deed, and that *William* was bound to conform to all the uses of the deed of 1722, under which he claimed. It is now settled that no man can claim under a deed or a will, without confirming the instrument under which he claims; therefore *William* could not be entitled to take any benefit of the settlement of 1722, without confirming that settlement. It is contended, that he has made his election to abide by the deed of 1722: but I cannot say that he has done enough to make an election; on the contrary, he has refused, for he has suffered a recovery to give the estate another course. Then
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the questions are, whether *William* was bound to give up all benefit of the deed of 1722; and whether the powers which he has exercised are improperly exercised; and whether the person who now claims has a right to a compensation. The first question is, what *William Freke*, the settlor, intended, as to *Hannington*; he had a right to settle it to such uses as he thought fit, he might have given it, so that if the grandson became possessed of *Batson's, Hannington* should go over. What he has thought fit to do, is this; he has given *William*, the grandson, an estate for life; he has given him a power of jointuring, under certain conditions; he has also given him two other powers, one of leasing, which he has exercised to its utmost extent, also a power of charging it with £4,000, which has also been exercised. Then it is contended, that he could not intend to give *William* these powers, unless he complied with the condition, and suffered the recovery. But I am not prepared to say, that *William Freke*, in exercising these powers, contravened the intention of the settlor; otherwise, I would give the plaintiff a compensation for what he loses by the exercise of the powers.

The deed itself is the only criterion by which to judge of the settlor's intention, and there, so far from having declared, that if he should neglect suffering a recovery of *Batson's*, he should forfeit *Hannington's*, he has left him in full possession of his life estate. The words of the deed are not at all doubtful, there is not a word in it like a condition to settle *Batson's*; and I am desired to insert a clause, imposing a condition not implied in the deed. I am clearly of opinion, that he was tenant for life, without any restriction expressed or implied upon his exercising the powers. It is clear that, in all events, *William Freke* was to have his estate for life: but it is said, upon his not complying with the condition, his powers were to cease: but in no case can a Court of Equity presume a condition in a deed. As to the leases, if they are not made according to the power, the owner of *Hannington* may get rid of them at law. Then it is asked, can it be conceived the settlor meant the *Hannington* estate to be so charged, unless *Batson's* was made subject to the same uses? Perhaps we may be surprised at this, but I must read the deed; and where is the condition imposed? It might have been as easy to have said, that on default, his powers in *Hannington* should cease. It is contended, that under the very words of the deed, the powers cease, he having said, that all estates subsequent to the life estate should cease. Upon this part I have had some doubt; but on the best consideration I can give it, I think I should do too much violence to the words of the deed, if I carried them so far as to say this was the true construction, and I cannot find sufficient in the deed to warrant this. He has given him an estate for life, with powers with which the estate would be loaded after his death. The grandson has not exercised the power of jointuring, but he has the other powers, and there is nothing to put an end to the powers at his decease.

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By—

By coming here, the plaintiff seems to shew that he could not venture the question on the leases in a Court of Law; but if the leases are good, the charge must be so likewise.

I admit the Court might interfere in respect of the term of five hundred years, being prior in point of limitation, and that if I thought the charge bad, I could restrain the trustees from raising the £4,000; but I do not find that the powers are given under a condition to settle *Batson's*, therefore I think I must dismiss the bill entirely.

I do not mean to intrench on the rule, that no man can take an interest under a deed * or will, without confirming the deed or will.

But

* The doctrine of election has been, in general, confined to the cases of wills; that the party should, in like manner, be put to his election, where he claims under a deed, was determined in a case of *Bigland v. Huddleston*, 27th January, 1789, which was as follows: *Robert Walres*, the paternal grandfather of the plaintiff, by will dated 15th July, 1780, (having devised real estate) among other things, gave to his daughter *Anne*, the plaintiff's mother, the sum of £8,000, and directed his trustees to cause to be paid £4,000 part thereof, to her younger children, at the time of her death, if any such should be, equally to be divided among them, and if there should be but one such child, then to such one child; he gave a like legacy to his other daughter in the same manner, and gave the residue of his personal estate between them. Previous to the marriage of plaintiff's father, *George Bigland*, with the said *Anne*, a settlement was made, by indenture, 7th and 8th June, 1781, whereby the father settled *Bigland Hall* to the use of himself, for life; remainder to trustees, to preserve, &c. remainder to *Anne* for life; remainder to trustees; remainder to first and other sons in tail male; remainder to daughters, as tenants in common, in tail; remainder to himself in fee; and *Anne* conveyed her legacy of £8,000, as to one moiety thereof, to her husband absolutely; and as to the other moiety, to trustees, to pay the interest to *George* for life; remainder to herself for life, if she survived; then to pay the principal to the younger children of the marriage, equally; the shares of the sons to be payable at twenty-one, those of the daughters at twenty-one, or marriage, and if but one such child, then to such child, with survivorship; and a proviso was made for the younger children of *Anne* by any other marriage; and in case there should be no child of the marriage, one moiety to be paid to *George Bigland* absolutely, and the other to such uses as *Anne* should direct. She then conveyed the residue, which she took under her father's will, to the trustees, as to £6,000 part thereof, to pay the interest to *George Bigland*, for life, then to pay the principal thereof to the younger children of the marriage, and, in default of younger children, then as she should appoint, and in default of appointment, to her next of kin, and as to the remainder of the said residue, plate, household goods, &c. subject to other trusts. The marriage took effect, and 31st January, 1781, *Anne* died, leaving the plaintiff, her only child, and without making any appointment. The bill was filed on the part of the plaintiff, claiming to be entitled to the £4,000 moiety of the £8,000 legacy given by the grandfather's will, and also a contingent interest in the £6,000, and the trust estate, praying that the plaintiff's rights might be declared, and the sum secured for the plaintiff during his minority. The father, by his answer, claimed one moiety of the £4,000 in his own right, and the other as personal representative of his wife; and all the answers submitted a doubt as to the £6,000, whether the plaintiff was not excluded from that, as being an eldest and only son, and the father submitted, whether he, having obtained administration, was not entitled.

The decree ordered an account of the grandfather's personal estate, and that it be divided into moieties; and out of one moiety which belonged to *Anne Bigland*, £6,000, pursuant to the settlement, be deducted, and £3,000, one moiety of the £6,000, with a moiety of a moiety, of the residue of the personal estate, be paid to *George Bigland*: and further ordered; that the remaining

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But I do not think the intention here sufficiently appears, otherwise I would take care it should be complied with, either by setting aside the uses, or giving a compensation.

The bill was therefore dismissed as to all but what prayed the delivery up of some deeds, &c. in the possession of the trustees (a).

£3,000, and the surplus of the moiety of the personal estate of the testator be paid into the Bank and laid out; the dividends to be paid to *George Bigland*, for life, and at his decease the parties to be at liberty to apply: and as to the £4,000, the Master was directed to enquire, *whether it would be for the benefit of the infant to take under the settlement of the 8th June, 1781, or to claim the £4,000 against the settlement.*

(a) This determination was approved of by Lord Rosslyn, in *Lewis v. Freke*, 2 Ves. jun. 507. a case in which the present plaintiff was defendant. The cases upon the doctrine of election, are contained in the Editor's notes to *Blake v. Bunbury*, post, vol. iv. 21. and *Forrester v. Cotton*, 1 Eden, 532. The late cases of *Green v. Green*, 2 Meriv. 86. and *Chatwynd v. Fleetwood*, 4 Bro. P. C. 435. edit. Toml. vol. i. 300. and *Moore v. Butler*, 2 Sch. & Lef. 266. are additional instances of the application of the principle to deeds; in the last of these Lord Redesdale, p. 268. contemplated the very case which afterwards occurred in *Green v. Green*, viz. part of the lands subject to an entail not barred, and another part that could be well settled. It would be most mischievous, his Lordship said, to hold, that the eldest son should have the benefit of the settlement, as to the lands well settled, and not perform the contract as to the other part. In the above cited case of *Green v. Green*, Lord Eldon considered it as a question of very great difficulty whether, where a party elects under a settlement to take one or the other of

two beneficial interests, he is bound in equity only to make compensation to those who are disappointed by the election, or to surrender entirely the other part of the title under which he claims. His Lordship, on a subsequent day, said he was inclined to think that he must give up the whole of the benefit, the principle being, that if a man will not give the price which the parties meant he should give, he shall not have the thing contracted for. That there were a number of cases deciding that where an express or implied condition arises under a will, the party taking is not bound to give up more than is enough to make satisfaction. That under a settlement it is difficult, for there an express contract has been entered into between the parties: that Lord Chief Justice De Grey seemed to advert to this distinction, when he said that an express condition must be performed as framed; and if it is not, that will induce a forfeiture, but the equity of the Court is to sequester the devised interest *quousque*, till satisfaction is made to the disappointed devisee, *Lady Cavan v. Pulteney*, 2 Ves. jun. 560.


PIKE v. WHITE.

A custom (in a manor) that copyholds shall not be surrendered to the use of a will, is bad.

A surrender must be supplied for children, wherever the heir is provided for, though the provision be not from the testator.

BY articles previous to the settlement, upon the marriage of *George White*, father of the plaintiffs, and of defendant *Thomas White* with *Mary Wayt*, his wife, 19th May, 1752, *George White* covenanted to convey his messuages, lands, &c. in *Newton*, in the county of *Wilts*, to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder

to the use of *Mary Wayt* for life, in bar of dower, remainder to trustees for five hundred years, in trust to raise a sum not exceeding £2,000 for younger children, in such shares as *George White* should appoint, remainder to the first and other sons of the marriage in tail, remainder to his own right heirs for ever.

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The marriage took effect, and *George White* and *Mary* his wife had issue five children, the defendant *Thomas White*, his only son, and the plaintiffs *Sarah, Mary, Anne, and Jane*, his daughters.

By articles of agreement, previous to the marriage of the defendant *Thomas White* with *Mary Wood*, *George White* and *Thomas White* covenanted to convey the messuages, lands, &c. in *Newton*, to trustees, to the use of *George White* for life, remainder to *Mary* his wife for life, remainder to *Thomas White* for life, remainder to *Mary Wood* for life, remainder to trustees for a term of one hundred years, to raise £2,000 for younger children, and after reciting the above agreement of 19th May, 1752, and the term therein contained, *George White* covenanted with the trustees that he would not charge the same with more than £500.

After making this settlement *George White* died, having made his will, dated 6th March, 1779, duly executed to pass real estates, and thereby gave and devised all his freehold, leasehold, and copyhold lands, &c. at *Shrievenham*, in the county of *Berks*, and elsewhere, to his wife for life, and after her decease to trustees, in trust to sell the same, and apply the money arising therefrom to and among all his daughters as should be living at the death of his wife, and the issue of such as should be dead; and reciting that he had power to dispose of £500, to be raised out of his estate at *Newton*, under the marriage settlement of his son (the defendant) *Thomas White* and his wife, the testator gave the £500 among his daughters and their issue, as before directed, of the money arising by the sale of the trust estate.

The copyhold estate at *Shrievenham* (which the testator had bought of his wife) was not surrendered to the use of the will.

George White died, leaving the defendant *Thomas* his only son and heir, and the plaintiffs, his four daughters, and also leaving *Mary* his wife surviving him.

Mary, the widow, entered upon the estates devised to her for life, as well as upon the copyhold estate at *Shrievenham*, as other copyhold estates of the testator, and upon the estate at *Newton*, settled on her for life, and enjoyed the same till her death, 16th August, 1788.

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The bill was filed against *Thomas* and others, praying that he might be decreed to pay the £500, charged on the estate at *Newton*, that the same might be raised by sale or mortgage of the term, and that the copyhold at *Shrievenham* might be declared to pass by the will, and that the surrender of the same

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might be supplied in favour of the plaintiffs, as being the children of the testator, charging, that the defendant *Thomas* is amply provided for by the settled estates of which he is in possession.

The defendant *Thomas White*, by his answer, admitted the will, but as to the copyhold at *Shrievenham*, he said, he had been informed, and believed, that according to the custom of the said manors, copyhold lands holden thereof cannot be surrendered to the use of the will of the tenant, and are not devisable by virtue of any custom prevailing in the said manors, and therefore he submitted they did not pass by the devise; he further insisted, that as the testator did not surrender the copyholds, they did not pass by the will; and that he ought not to be deprived of his legal right to the copyhold: and also contended, that he was not to be considered as provided for, he not inheriting any property from his father, except the copyhold premises at *Shrievenham*; as he is advised that *he is a* purchaser of the estate at *Newnton*, under the marriage settlement of his father and mother, under which he was tenant in tail thereof, until he joined with his father in barring the estate tail, and took an estate for life therein.

Lord Chancellor said, it was totally impossible to say that a copyhold surrendered to the use of a will should not pass thereby, and therefore he must declare the custom (if there were such a one) bad (a); and that the defendant being provided for (it

(a) *Serjt. Hill*, in a MS. note, in the index to his copy of *Gilbert's Tenures*, after citing this observation, adds, a *quære*, referring to the expression of *Lord Thurlow*, in *Wardell v. Wardell*, ante, 117. as implying that such a custom may exist. *Mr. Evans*, in a note to his very valuable collection of the Statutes, vol. i. 473, observes, that it is difficult to support the above opinion of *Lord Thurlow*, upon the principles of mere legal reasoning, or to discover upon what correct principles, a custom according with the general common law, and not affected by any legislative provision, could be controuled or superseded by mere judicial authority. He adds, that certain customary estates are still not susceptible of devise otherwise than by the medium of deeds of trust, and which, in some instances, must be renewed annually, or after certain periodical intervals, so that if the time of renewing them is suffered to elapse, or the testator falls into a state of incapacity, the devise becomes inoperative.

Lord Eldon cited this opinion in *Church v. Mundy*, 15 Ves. 404. in which

enquiries were directed to ascertain whether there was any custom of surrendering a vested interest in reversion or remainder, expectant upon an estate-tail. *Mr. Evans's* construction of the passage is, that his Lordship expressed himself of the same opinion as *Lord Thurlow*. The Editor however submits that it is intended to convey nothing more than a statement of the substance of *Lord Thurlow's* sentiments upon the subject.

It is observable, that the late act, 55 Geo. 3. c. 192, leaves this question as it was, extending only to all cases where, by the custom of any manor, any copyhold tenant of such manor may, by his or her last will or testament, dispose of, or appoint his or her copyhold tenements, the same having been surrendered to such uses as should be declared by such last will and testament, &c. *Mr. Evans*, who was employed to prepare the draft of the bill states that he had originally submitted it as embracing all copyhold and customary estates with respect to such interest as a testator could by any means have disposed of.

did

did not signify by what means) the surrender must be supplied (a).

(a) See, as to this, *Chapman v. Gibson*, ante, 232; and *Lindopp v. Eborall*, ante, 188.

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TRASH, Administrator of WILLIAM CLAYTON,
Esq. deceased, unadministered by SAMUEL
YOUNG, deceased, original Administrator of
WILLIAM CLAYTON. } Plaintiff.

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Lincoln's-Inn
Hall, 22d July.

AMY WHITE, Widow, GEORGE LONG, and
MARY his Wife, WILLIAM GIBBONS, and
AMY his Wife, SAMUEL BARNEY, and WIL-
LIAM SCURR. } Defendants.

THE original bill was filed 2d May, 1787, by *Samuel Young*, as administrator of *William Clayton*, deceased, and prayed that the defendants might redeem the mortgaged premises, or be foreclosed, and for that purpose stated as follows:

That *George Mills* and *Amy* his wife, being entitled to the premises, subject to a mortgage made to *Francis Simmonds*, then deceased, and upon which were due to defendant *Barney*, as his executor, £205, applied to *Clayton*, to enable him to pay the same off, by a loan of money, to be charged by mortgage on the same premises; that *Clayton* advanced £200, and *Mills* paid the other £5 to *Barney*. The mortgage to *Simmonds* was not assigned by *Barney* to *Clayton*, but delivered up to him; and a new mortgage, dated 13th September, 1760, was made by *Mills* and his wife to *Clayton*, to secure the £200 and interest. That the interest of the money was paid for some time by *Mills*, but no part of the principal, and in the year 1767, the interest being then in arrear, *Clayton* delivered ejectments, which were not afterwards proceeded on, *Mills* having paid the arrears of interest then due. That *Amy Mills* died soon after, and in 1783 *George Mills* died, and *Clayton* also died, and administration was granted of his effects to the (late) plaintiff *Samuel Young*. *George Mills* died intestate, leaving defendant *Amy White* and *Elizabeth Mills* his only children and heirs at law. Sometime after his death *Elizabeth Mills* also died, having devised all her lands, &c. to *Mary Long* and *Amy Gibbons* in fee, as tenants in common, who now claim to be entitled to the mortgaged premises: to whom the plaintiff applied for the mortgage money, and upon his refusal filed the bill, praying that defendant *Barney*, as executor of *Simmonds*, might be declared to be a trustee for him, and that the other defendants might redeem or be foreclosed.

Although non-payment of interest for twenty-years on a mortgage where clear, and no demand, raises a presumption of payment, yet, on doubtful circumstances, and the original mortgage admitted, it was referred to the Master to enquire whether any interest had been paid.

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The defendants, by their answers, said they were strangers to the subject, yet they believed *Mills* mortgaged the premises to *Clayton*, that they knew none of the circumstances of the transaction, but also believed that no fine was levied, and that, as defendants believed *Mills* had no estate in the premises, but a right to take rents and profits for life, in right of his wife, the premises were not affected by the mortgage for more than his life: they said they also believed that *Mills* for some time paid the interest, but observed, that it is *not stated* in the bill *that any interest had been paid since 1766*, although both *Mills* and *Clayton* lived seventeen years after that time, and believe no money has been paid since that time, and *insist* that, under the circumstances, it ought to be *presumed that the £200 and interest was paid in the life-time of Mills*, and insisted on the statute of limitations.

After the death of *Young* the present plaintiff took out administration *de bonis non*, and filed the present bill of revivor.

The only question now was, whether non-payment of interest on a mortgage for upwards of twenty years afforded a presumption of payment.

Mr. *Lloyd* and Mr. *Grimwood*, cited the case of *Leman v. Neunham*, 1 Ves. 51, to shew that interest not having been paid for twenty years does not raise an absolute presumption of payment in case of mortgages; though the general rule is so as to other securities, as bonds: but in this case, it is admitted there was a mortgage and a great arrear of interest due, which would take it out of the rule of the presumption, even if it was admitted to be so; at least so far, that the Court will send it to an enquiry before the Master.

Mr. *Solicitor-General*, and Mr. *Ainge*, argued that there was a presumption, arising from the non-payment of interest, that the principal money had been paid. The security originally given, was a mortgage from *Mills* and his wife to *Clayton*; no notice was taken of the prior mortgage to *Simmonds*. The evidence of *Barney* is, that he received the money from *Clayton*; a fine was levied of the wife's estate in 1742: but this would not give the estate to the husband without something further appeared, either from the recital of the deed, or otherwise, to be the wife's intention. This was the doctrine of the Court in *Edwards v. Lady Vernon*. Then all that appears is that in 1760 the sum of £200 was advanced, upon an agreement that *Simmonds*, or his executors, should convey to *Clayton*, but it appears that no such conveyance was ever made. *Clayton* had every notice to call on *Barney*. And no interest was paid from the year 1766, although both *Clayton* and *Mills* were alive till 1783. That no application should be made in this length of time is extraordinary, and raises the presumption that the money was paid. The presumption is analogous

to the statute of limitations. They cited *Daykin v. Monk*, in the Exchequer.

Mr. Selwyn in reply.—There is no rule upon the subject at common law. The rule in equity is in analogy to the statute of Limitations, *Aggas v. Pickerell*, 3 Atk. 225. In this case, although we do not shew instances of payment of interest or demand, we only wish to have an enquiry into the matter. The mortgagor not having the receipt for interest cannot vary the effect of the statute.

Lord Chancellor, during the argument, said that if the case was clear, that no interest had been paid for twenty years, he had always understood that it *did* raise the presumption that the principal had been paid; but there must not only be non-payment of interest, but *no demand*: and in that case, he thought the presumption on a mortgage as strong as that at law; but, upon the circumstances of the present case, he referred it to the Master, to enquire whether any interest had been paid, with leave to examine the parties upon interrogatories (a).

(a) The cases upon this subject are collected in the note to *Perry v. Marston*, ante, vol. ii. 397.

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Nabob of ARCOT v. The EAST INDIA Company (a).

THE bill stated that the defendants, about the year 1781, applied to the plaintiff for payment of a debt due to them from the plaintiff, in respect of expences incurred on his account; which demand the plaintiff being unable to comply with, he proposed to give, and the then governor of *Fort Saint George* in the *Carnatic*, on behalf of defendants, consented to accept of an assignment of the revenues accruing to the plaintiff, as Nabob and Lord Paramount of the *Carnatic*, as a security for the said demand.

That in pursuance hereof an instrument in writing was prepared and executed, purporting to be an agreement between the plaintiff and Lord Macartney, the then governor, dated 2d December, 1781, whereby, in consequence of plaintiff assigning to the governor the revenues accruing to him as Nabob, the governor and council were to account to him for the same.

That in pursuance of this agreement Lord Macartney was empowered to collect, and did receive the same from December 1781, to June 1785.

That in June 1785, defendants restored plaintiff to the receipt of the revenues, and by another agreement dated 21st June, 1785,

(a) Reg. Lib. B. 1790. fol. 422.

plaintiff

S. C.

1 Ves. jnn. 371.

Lincoln's-Inn
Hall, 23d July.

Plea by the East India Company, to a bill for an account, filed by the Nabob of Arcot, that by charters, confirmed by act of parliament, they had certain powers, by virtue of which the acts were done, overruled: it not setting forth the contents of the charters and act of parliament.

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plaintiff agreed to pay his proportion of the current charges, as stipulated by defendants, to be finally settled by treaty between plaintiff and the governor and council of *Madras*, and, until the exact proportion could be ascertained, the plaintiff consented to consider it at the annual sum of four lacks of pagodas, by certain kists or instalments, and the plaintiff also agreed to pay the annual sum of twelve lacks of pagodas in discharge of debt due to the defendants.

The bill charged that the above sums, which had been paid by the plaintiff to the defendants, and the revenues received by the defendants whilst in possession, were more than sufficient to re-pay the defendants their debt; and prayed an account, and that the defendants might pay any balance that might appear thereon to be due to plaintiff.

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To this bill the defendants pleaded in bar, and for plea said, that by divers charters, or letters patent and deeds, and also by divers acts of parliament confirming the same, they have given to them, together with other liberties, privileges, and licences, the whole entire and only liberty and privilege of trading and trafficking unto and from the *East Indies*, and all the countries and parts of *Asia* beyond the *Cape of Bona Esperanza*, where any trade or traffic of merchandize is or may be had; and that by the same charters, &c. they have free liberty and licence to send either ships of war, men, or ammunition, into any of their factories or places of their trade in the *East Indies*, for the security and defence of the same; and to choose commanders and officers over them, and to give them power and authority, by commissions under their common seal or otherwise, to continue or make peace or war with any prince or people that are not Christians, in any places of their trade; and also to right and recompense themselves upon the goods, estate, or people of those parts, by whom they shall sustain any injury; and that under and by virtue of such liberties, &c. they have acquired and possess large territorial possessions, particularly in the *Carnatic*, on the coast of *Coromandel*, in the *East Indies*; and, upon and for the defence and security of which, and the benefit of their trade, they have from before and ever since the time of making of the several instruments in the complainant's bill mentioned, and of the several dealings and transactions, matters and things taking place between these defendants and the complainant, in the said bill mentioned, raised, and maintained, and kept, and do now maintain and keep, a large military force. And the defendants, for plea further said, that the complainant is a sovereign and prince within such the places of their trade aforesaid, and is not a Christian; and he also, at the time of making the said instruments, &c. had and enjoyed, and does now hold and enjoy, divers large territorial possessions within such places, and particularly in the *Carnatic*, aforesaid; and that the said instruments in writing in
the

the bill mentioned, and the several dealings and transactions therein mentioned, were entered into and done by those defendants, by virtue and in exercise of the liberties, &c. so granted to them as aforesaid and the complainant as such prince aforesaid; and that the same, and all the dealings and transactions mentioned in said bill, do respectively relate to matters transacted between them, in regard to peace and war, and the security and defence of the territorial possessions belonging to them respectively in the *Car-natic* aforesaid; and these defendants are advised, and submit that such instruments, dealings, and transactions, being so entered into and done, or any thing relating thereto, are not nor is subject to *any municipal jurisdiction*, nor cognizable in this honourable Court or any court of justice; which matters these defendants aver and plead in bar both to the discovery and relief sought by the bill.

This plea having been set down to be argued,

Mr. Attorney and *Mr. Solicitor-General*, *Mr. Mansfield*, *Mr. Rous*, and *Mr. Stratford*, argued in support of the plea.

A bill on this subject cannot be entertained by this Court; transactions between sovereign princes, or foederal transactions, cannot be liable to any municipal jurisdiction. No law can apply between them but the law of nations. These are such transactions: for, by the charters and acts of parliament, the *East India Company* are constituted a sovereign power; or at least, are the delegates of the sovereign power of this country, for the purposes of making peace and war. The power they exercise is the power of the state; the war when commenced is the war of the state. The charters operate as a commission from the state, transacted by the Company as its delegate. If such a power were delegated to a general, the war when made, would not be the war of the individual, but of the state delegating: but it is sufficient, if one of the parties be a sovereign power, to take it out of municipal jurisdiction; and the plaintiff is allowed to be a sovereign prince: the treaty of *Paris* in 1763 comprehends him as a sovereign prince; and both the treaties of 1781 and 1785 are referable only to his power as a sovereign; they related to the mutual defence of their respective territories. A municipal court could not enter into a discussion concerning them without entering into the whole connexion between the Company and this prince.

Another objection to the bill is, that the Court cannot enforce submission: in case the plaintiff, on the account taken, should appear to be the debtor, how could the Court enforce payment? If the Court is not capable of giving relief, it is good ground for a plea to the relief and the discovery. From the character of the persons the Court could not enforce its decree; even if this was between individuals it would be difficult for the Court to enforce it, from the difficulty of putting a receiver upon an estate in *India*; but that cannot be done on the territory of a sovereign prince, no more

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more than it could if the matter were an agreement between the courts of *England* and *France*. Can the Court enjoin a war between the parties? Your Lordship will not entertain a suit that cannot be executed by the common means.

Then suppose a decree for the plaintiff, and the money ordered to be paid to him, he may be adverse to the interests of the Company in *India*, and the money when paid might be applied to adverse purposes. This, if known before the decree, would be no answer in a court of municipal jurisdiction; but, according to the law of nations (the rule between sovereign powers) it would be a good reason against the decree; suppose £500,000 found due to the plaintiff, and that by joining adverse powers, he had committed devastation on the territory of the defendants, could this be considered as matter of set off?

But by the act of parliament of the 24th and 26th of the present king, the *East India* Company are prevented from giving this discovery. They are under the absolute authority of the Board of Controul, and cannot act but under their direction. Suppose their orders and those of the Court should be contradictory, what a situation the Company would be in! The Board of Controul too may give secret orders; the Company could not shew that they were contradictory without breaking through that secrecy; and the Board of Controul may send secret orders to the presidencies in *India* contrary to what the *India* Company might be decreed to do. If such a case be possible, the Court could repeal the act of parliament.

But there is no necessity for such a bill, as the affairs of the Company are administered by commissioners appointed by the king; the Nabob therefore might obtain justice by an application to the crown. Thus the *Dutch East India* company applied lately by memorial to the crown.

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With regard to the form of the plea, it sufficiently points out the state of the parties, and that the matter in question is matter relative to peace and war, which cannot be the subject of municipal jurisdiction.

Mr. Mitford, Mr. Anstruther, Mr. Adam, and Mr. Fonblanque, argued against the plea.

The question is, whether this plea can be allowed. To answer this we must examine what is the nature of a plea in this Court. It is a special defence, which submits whether, under the circumstances contained in the plea, and not stated by the bill, the Court sees enough of the case not to go on; *it must therefore state facts to shew that the Court has no jurisdiction*. The whole case must appear on the face of the proceedings; because it must appear in case of a bill of review or appeal. Nothing can be read upon a plea, the whole must appear upon the plea itself. Now, what is the subject of this bill? It is a mere bill for an account. It states the

the transaction between the plaintiffs and defendants, and that on the account taken, the Company are indebted to the plaintiff. The plea admits the facts of the bill, but says, that there are reasons why the plaintiff shall not have his remedy; it refers to charters, deeds, and acts of parliament, but does not set them forth; so that it is impossible to discover what powers are given. Those powers do not appear by the acts of parliament, (which only enable the crown to grant charters,) but by the charters themselves, which therefore ought to be set forth; for your Lordship is to put a construction upon them, not to take that imposed by the defendants: therefore the plea not setting them forth, is bad. The plea says that the transactions between the plaintiff and defendants were under and by virtue of the liberties granted to them. Whether they were so or not is an inference to be drawn from facts, which are not stated; in order to draw the inference they should state the facts from whence it is to be drawn. Suppose a party was to plead that he is a purchaser for valuable consideration, Lord Hardwicke said, he must set forth his purchase deeds, that the Court may see that he is so. *Chamberlain v. Knapp*, 1 Atk. 52. *Hughes v. Garth*, Amb. 401 (a). In this case the plea has not set forth the facts sufficiently at large. Then, with respect to the substance of the plea, it is a plea to the persons of the defendants and of the plaintiff. With respect to the defendants, they have been considered as independent or delegated sovereigns; and it is said, that this is not matter of municipal jurisdiction, because it relates to peace and war; but, in fact, the matter stated is a mere account not relative to matters of state; and certainly, in matters of trade, the *East India Company* are amenable to this Court, and if in that respect they are amenable, they cannot be considered as a sovereign power; they are only a creature of the laws of this country, to perform functions which could not otherwise be executed; and, for that purpose, invested with powers, which could not be given but by parliament, as the having a military force, &c. But those powers do not constitute it a sovereign state; so far from it, it speedily will not exist without some act of the sovereign power of this country to continue its existence. Therefore the Company is merely to be considered as a corporation, and of course, amenable here. They are also in this part of the plea inconsistent with themselves; upon other occasions they have stated themselves to be subjects of the Great Mogul. Then, with respect to the plaintiff being an alien sovereign prince; as an alien merely, if not an alien enemy, he may stand as a suitor in a court of justice. As a prince there is no objection to his suing here. It is said, as a prince he cannot sue here; it is true he is not compellable so to do, but, if he chooses it, he may. He has two ways of doing himself justice, he may apply to the govern-

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ment, or may make his appeal to the ordinary laws of the country. The writers on the law of nations say that reprisals are not justifiable till after both methods have been tried without success. In this case the Nabob is applying to the ordinary justice of the Court; if he fails there, he may apply to the exertion of the sovereign power. But there is no reason why, in the case of a debt from a subject of this country to a sovereign prince, there should not be such a remedy. There are instances in the books, where the King of Spain has sued for duties due in *South America*, and the only question was, whether the suit ought to be in the Court of Admiralty or in the King's Bench, 1 Rol. Ab. 528. 532. Hob. 78. Moor, 814. 1 Rol. Rep. 336. 2 Rol. Ab. 491; and it was lately laid down by Lord Kenyon, in *Foliot v. Ogden*, 3 T. R. 726. that a sovereign power might sue (a). Even in the case of indelible sovereignty, as between the King of Great Britain and the Nabob, if the matter was not of a federal nature, a foreign prince might sue, and your Lordship indorse a petition of rights. In *Ryley's Placita Parliamentaria* you will find a petition for the maintenance of foreign troops entertained, and judgment for the persons who sued. It is well known that the laws of this country are the only means of making the subject answerable for his conduct: and the Nabob of Arcot must be presumed, in his transactions with them, to have known this, and that he must apply to the laws. Even in questions between subjects courts of justice must often take notice of things not within the reach of mere municipal laws; they must often take notice of treaties; in case of capture, they must take notice that states are at war. *Molloy* b. 1. c. 1. cites 1 Rol. Rep. 175, where the Court were obliged to see whether the King of Spain and the Emperor of Morocco were at war; this shews they must often take notice of treaties. Suppose an agreement was made between this country and another foreign men, and the commander came to England without accounting, there could be no doubt of the right of the sovereign power to sue. As to the India Company, a question might arise between them and the crown as to troops; there is no doubt an information might be exhibited in this Court. As to the remedy not being mutual, that is so in many cases; wherever the crown sues the remedy is not mutual. So an alien may sue, who cannot be sued. In all countries the creditor may sue, though the defendant could not sue him. So, with respect to the Nabob, suppose the balance should be in favour of the Company, they have the same remedy now they had before. The East India Company are not in a higher situation than Lord Baltimore was in the case in 1 Ves. 444. He was a dependent sovereign (if such a phrase may be used) having the right of peace and war, and of coining; yet a dispute about boundaries arising, and an agreement entered into on the

(a) Vide the Editor's note, post, vol. iv. 187, 188.

subject,

t, a specific performance was decreed. So in the case of *Earl of Derby v. The Duke of Athol*, 1 Ves. 202, as to the *f. Man*. Wherever there can be a remedy *in personam*, a remedy may be had in a court of equity (a). Then it is concluded, that they cannot give this discovery because they may be sued by the Board of Controul; the Board of Controul have nothing to do with it: they may as well say they are prevented from paying a bond, or any other debt, as that they cannot discover the state of this account. With respect to their applying to the legislative power here, if that means the legislature, it is extraordinary that in a common matter of account the Nabob should be obliged to an application to the legislature.

Attorney-General in reply.—Two questions arise, whether the bill is good; 1st, in respect of its form; 2d, in substance. The gentlemen on the other side have avoided taking the whole bill together, as stated by the bill; they have avoided the question, because it clearly appears to be a foederal treaty, arising out of peace and war. The bill is brought for matter of fact; but it states the agreement of 1785, the subject-matter of which was, their contribution of charges in carrying on a war; the bill refers to the treaty and makes it part of it, and the eighth article of the treaty is expressly for military expences, and the bill concludes by a stipulation that the agreement should have the effect of a treaty. The common defence of their respective territories was the subject of the treaty. It was a subsidy treaty, and has always been considered as a foederal treaty. The plea is not to the acts of parliament, and to the charters. It was not necessary to set them out, because the acts of parliament are recited, and many of them contain the charters. Then the plea is that the acts were done in pursuance of the privileges granted to the Company, and goes on to say that the same relate to peace and war, and the defence of their territorial possessions. The plea sufficiently confines the transactions to the *Carnatic*,

as the courts of law have no jurisdiction over actions, respecting lands lying abroad, the *Isle of Man*, the *Colony*, nor can Courts of Equity act in *Countess of Derby's case*, 12 Ves. 402. affirmed 4 Inst. 283. *Cartwright v. Pettus*, 2 Ch. Ca. 214. *Sir John Pettit's case*, cited 1 Vern. 421. *Case*, cited arg. *Fabrigas v. The King*, 20 How. St. Tr. 215. But a Court of Equity can act upon the person residing here, and therefore may direct to any contract made concerning such lands, or any equity between persons in this country respecting them, the Court will hold jurisdiction as if they were

situated in *England*, and imprison the party disobeying its orders, *Archer v. Preston*, 1 Eq. Ab. 133. *Earl of Argyll v. Muschamp*, 1 Vern. 75. *Lord Kildare v. Eustace*, ib. 419. *Toller v. Carteret*, 2 Vern. 494. 1 Salk. 404. *Penn v. Lord Baltimore*, cited *supra*. *Earl of Derby v. Duke of Athol*, ibid. *Roberdeau v. Rous*, 1 Atk. 543. *Foster v. Vassal*, 3 Atk. 587. *Lord Cranston v. Johnston*, 3 Ves. 170. *White v. Hall*, 12 Ves. 321. See the question whether an issue can be directed by a Court of Equity to try the validity of a will of lands abroad; discussed in a note to *Pike v. Hoare*, 2 Eden, 135.

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putting the circumstances together; but supposing in a case of this sort there should be any omission, it would seem but reasonable to ask leave to amend, in order to bring a question of this importance properly before the Court. The next question is whether the plea is, in point of substance, a bar. It states that the Company are endowed with powers of making peace and war; a defensive war is clearly alluded to. The same fallacy has run through the argument of all the counsel, they do not refer to the mixed nature of the Company, which, though here considered as a trading Company, is there in the character of a sovereign power. Most undoubtedly the Nabob's suit might be brought before the mayor's court of *Madras*. The consequence would be, that the account must be taken before their inferior officer, and nothing but confusion could arise from the suit being brought before such a tribunal. But this account *cannot be matter of municipal jurisdiction*, because the defendants could not have an opportunity of defending themselves in such a suit. It is impracticable for the Company to bring in reasons before this Court. A new creature has arisen, which prevents the Company revealing to this Court the state in which it stands with respect to the country princes. There is an essential difference between sovereigns and individuals. As to the cases which allow of a sovereign suing, they are certainly right, as the sovereign may certainly wave his sovereignty; but there is no case of one sovereign suing another. The cases of prize being brought in a municipal court arises from the law of nations; but no instance is produced of one sovereign power bringing an action against another sovereign power. Suppose the *Danes*, or any other *European* powers, to be parties to a treaty with the *East India Company*, how could the courts of either of the countries administer justice between them? In the present case, suppose the result of the account to be in favour of the Company, what remedy could they have? Another confusion must also arise; suppose the states be called upon to act as states upon the subject, are they, in that character, to obey the injunction of a municipal jurisdiction? Could the Court enjoin the Company from going to war? The distinction, with respect to jurisdiction, is between matters arising by treaty and matters arising by contract. Where both parties have the power of the sword they must refer to the law of nations, as the only judge between them. In the case of the *Dutch Company*, why was a memorial presented, and not a common action brought? because, *where the Court cannot put justice in execution the tribunal is inadequate to the jurisdiction*. It is necessary for the *East India Company* to know who are to be the expositors of their treaties. If the doctrine held to day prevails, their treaties will be the subject of investigation in the courts in the *East Indies*; but an account arising

from a federal treaty cannot be a proper subject of jurisdiction (a).

At the close of the argument, *Lord Chancellor* spoke to the following effect :

Whether another plea ought to be put in, or the defendants should amend this plea, is a question of a different complexion from that now before me ; because no motion has been made on that subject. I shall expect, whenever they make a motion, that the form of the plea they intend to put in will be laid before the Court ; for amendments when moved should be stated, that the Court may see whether it is material that the cause shall be delayed for the purpose of admitting

an argument is so disproportionate to the state of the case as it is before me, that, in disposing of it, I shall not have occasion to go a great way, at least not so far as the argument has reached the bar.

To consider the plea in point of form and in point of substance seems to me to be an inconvenient distribution ; because I do not know where to find the substance of a plea but in the form of it ; or what the parties mean to urge before me, but in the words they use ; the form of a plea, and the substance seem therefore to me to be much the same.

In a general view of the plea it is perfectly new. It is stated to be new to the jurisdiction of the Court ; but it differs from a plea to the jurisdiction in all the particulars by which those pleas are described ; because (as it has been truly observed) it is not a plea to the jurisdiction of any particular Court, but *giving another remedy to the party in some other Court.* This plea says expressly, that the party has no remedy in any

the course of the argument the plaintiff, the *Lord Chancellor* observed, for the purpose of bringing the matter to the point, that the plaintiff should admit the agreement and the fact (but not so as to admit) that £500 is due upon a bill of accounts, and that they should be ordered to pay that *ex ratione*, and the *Nabob* should bring an action in the Court of King's Bench for that bill standing over, notwithstanding the bill would remain but the account and the action. His Lordship said, if the plaintiff succeeded in the King's Bench, the plaintiff would plead with more confidence ; if they fail there, the £500 would remain as a pledge, that the plaintiff could plead in the Court of Chancery against this demand, they would

have the same advantage of it there as here ; and the plaintiff could not go on with his bill, but if they could not answer it in an action, it would be very difficult to say, they could here. But this proposal was not acceded to, the *Attorney-General* saying, the defendants did not mean to admit anything to be due. The *Lord Chancellor* also observed, that the King of Spain had been once out-lawed, by *Selden's* advice, to prevent him from taking advantage of his suit ; that the out-lawry was bad enough, but good till reversed ; therefore it was necessary for him to come in to reverse it, in order to take advantage of his suit. His Lordship said, he could not quote a better book for this, than *Selden's Table Talk.* (*Vesey*).

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Court of municipal jurisdiction whatever. I take it therefore, in fact, to be a plea in bar; as if it had been said *ex tali facto actio non oritur*; as if it had been gratuitous or honorary, or of that species of contract upon which an action does not arise. And if it had been necessary from the form of the bill, to have brought into the view of the Court that it was a demand of that description, the plea would have been a plea in bar to the action. And here the whole argument tends to the same end; that considering the situation of the parties, and the contract that has been entered into, as having relation to that situation, the contracts are not the subject of an action. The plea therefore, as I take it, is a plea in bar, not a plea to the jurisdiction of a particular Court, *but of all Courts*; and a plea to the jurisdiction of all Courts, I take to be absurd, and repugnant in terms. Even if the bill had stated all the case on which the argument on the side of the defendants relies, and had brought it to be that species of treaty which the law ought, for some reasons, to pronounce impracticable to be executed by Courts of municipal jurisdiction; it amounts to no more than saying that, from the matter of the action itself, *ex tali facto non oritur actio*.

In order to consider it in this point of view, it is necessary to see what the real state of the record is.

The bill states that the Nabob was in debt, or that it was alleged by the defendants that he was in debt to them. That he pledged the revenues of the *Carnatic*, of which he was a sovereign prince, to the Company, and permitted them to receive such revenues, under a promise that they would account for them, and set them against the debt. He proceeds to state the agreement of 1785, which in the bill is stated to be an agreement not at all relative to that in 1781, but perfectly distinct from it, and is stated to be a contract, onerous on the part of the plaintiff, for, of the twelve lacks of rupees that were to be allowed for current expenses, four of them were to be allowed in application to the payment of the existing debt of the Company, and other parts to other occasions.

It would be impossible to get on with an account, where both the parties were so delicate as not to state what those other occasions were, and I who know nothing of the history of the Company, but what I know from this bill and plea, certainly do not know what they were: but still the observation I make is, that the treaty in 1785, as stated, was in its foundation, its effects and consequences, entirely distinct from that of 1781.

The bill, after stating this agreement, proceeds to say that the receipts, under the first agreement, have totally extinguished the debt; and, consequently, that the Company ought to be accountable for the remainder, beyond what they can claim as a debt; and that the Company having contracted with the plaintiff as private individuals, ought to account for the revenues of which they have been

been in receipt; and that they have received by that means a sum which, upon the account taken, will appear to be due to the Nabob. It has not been argued that this, standing by itself, would be demurrable, or that it would not be necessary to state something on a plea, to take it out of the predicament in which it stands in the bill, upon which it appears a reasonable demand for an account; but it has been urged that there is enough in the plea to shew that this is what you call a foederal agreement, by which one means a treaty between sovereigns concerning the public business of each sovereignty; and it is insisted upon to be such a treaty; I state it without the words *peace and war*, because if I were to go into that part of the argument, and to consider it with a view to the question, whether *ex tali facto actio non oritur*, I must not confine it to peace and war; for I apprehend it would be impossible to contend on the general principles of municipal, as it is distinguished from foederal law, that the terms of an agreement which relates to peace or war, are in a different relation from the terms of an agreement that relates to any other public subjects of the aggregate bodies, which are called sovereign nations: and therefore the position is, that wherever two sovereign nations have contracted upon matters respecting the sovereign bodies they represent, that the effect of the contract constitutes a species of obligation, *ex quo actio non oritur*. In order to apply this position to the present case, they have stated the Nabob to be a sovereign prince of the *Carnatic*: and that by law, I will not go further than to say, that by law, and the municipal constitution of this country, the *East India Company* being clothed with an authority to make war for their defence, or the melioration of their situation in respect of trade, or otherwise; that the Company being armed by charters, and the municipal authority of this country, with these powers, stand in all respects, relative to the exercise of that power, in the same condition as if they were sovereigns, without enquiring whether they are independent sovereigns, or execute delegated sovereignty: neither of which propositions can, with any tolerable strictness, be true, for they are pure subjects. A fictitious body of subjects formed by a charter, is as mere a subject as natural bodies in a state of subjection to the sovereign authority of the country, therefore they are pure subjects, to all intents and purposes whatsoever.

But the question remains, whether being armed with an authority to make peace and war, does not induce an authority to make treaties of a foederal kind, *quasi foedera*, and whether the treaties they so make do not put them upon *pro eâ vice*, in the same situation that sovereigns are with respect to the *foedera* contracted between them.

If therefore both these propositions were true, if *actio non oritur facto foederali* were true, and if this were an act of that kind, the

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question would arise how far they have pleaded themselves into that situation.

I could have wished, certainly, that by some means, either true or false, (for as they are a corporation, and speak without swearing, I suppose they would hardly think of confining themselves to truth) that they had been able to state expressly, the peculiar situation on which a question might arise, of the sort I have now stated, (and without stating which it is impossible it should arise) for if the *East India Company* has contracted with any other view than that, so as not to bring the shade of analogy over the contract, and to bring it within the principles which are supposed to govern them (to say nothing of the question, how far they would be considered to govern them) if they have not brought themselves within that, it will be impossible for me to supply the defect, and to treat the subject as if it had been brought within the only predicament upon which one *iota* of the argument I have heard will apply.

The case, then, upon the question I have stated as between sovereigns.—There are many Palatine jurisdictions, which are, as to, all subordinate relations, and perhaps as to making peace and war, like kingdoms. If an action had been brought on *fœdera*, against such Palatines, would or would not the Courts have repelled it— even though it had been grounded on the rights of war? Now, I think, upon that it is a very material line of argument to consider, *quâ ratione*, all the Courts of this country enter upon questions depending on such *fœdera*. In the first place, I do not take it to be true, as Mr. *Attorney* has argued it, that it is by the consent of nations: I know it is an opinion that has been treated very elaborately that there is an implied consent of nations, which binds nations to the decisions of the *forum* of each, where questions that arise upon treaties, or upon the law of nations, are decided in a court of admiralty. It seems strange to say, that this is the implication of our Court, which is a Court that arises by commission under the great seal, and where the terms of the commission point very much to the colouring such a conclusion, as that from whence there originates a fair ground of argument, that it was true if it were otherwise founded in fact. But in the first place, I take it to be clear that by the law of nations, in any one of the municipal *fora* (whether it be the Court of Admiralty, or the Court of Prize, instituted by special commission, or by the ordinary distribution of power) it is a just cause of war if their decisions are not adhered to by the other side, and that a neutral state cannot be bound, if it can state as its grievance unjust decisions there. In the next place, it is true that idea is confirmed by act of parliament; that the questions arise here before our Prize Courts, under recitals of all the acts which constitute Prize Courts, from the time of Queen *Anne* downward: the same jurisdiction is executed in *Scotland* under a Court of another description; and a question having arisen how far these prizes were controlable by the acts of parliament

it regulating prizes here, it was found necessary to make another which, without changing the form of the jurisdiction, made as determinable there just as they are here, but in the nature the suit they begin the complaint there, just as they do here, saved by the statute of Union *eo nomine*) and just as they do in us, yet undoubtedly the terms of treaties govern those jurisdictions in the same manner; and if the action is brought at common law, the terms of treaties will bind the decision, for the question where the action is to be brought, does not depend upon whether it is between natives and foreigners, or grown out of feudal engagements, but where they arise; if at land they must be tried at common law, and could not be entertained by the admiralty, for (though doubts have been entertained of it) according to my ideas, the statutes of prize do not extend the admiralty jurisdiction beyond its natural extent; and if they can be carried out it, (as was the opinion of a great lawyer) that does not diminish my argument (a).

Therefore, its being a treaty between nations will not be conclusive, but this may possibly be distinguished, because it may be intended, that where the subjects of a neutral prince bring their claim in the Admiralty Court, though the decision is to be regulated by the state of relation between the two countries, as its governing principle, yet the foundation of the action is the right of the individual; and it will not therefore come fully up to a determination between two sovereigns, upon a *factus* respecting their mutual sovereignty, nor up to the point, whether the Company not being sovereign, but having only private property, will be in the same situation. But before I think myself obliged to go largely into this point, and upon which I should probably wish to hear argument confined to it; and though the authorities of Vattel and Grocius, and other text books, might not afford very apt inferences, they might go some way towards affording general principles, upon which the decision might ultimately prevail.

Now to say here, will you enjoin, will you decree specific performance, is by no means a conclusive argument; I dislike the argument, because it stands clear of the fundamental principle upon which the question is to be decided; an argument which tends only to convenience cannot be admitted to any great extent, and in the absence of all fundamental principles. In the next place it is, according to the principle I am now stating, *ex tali facto non oritur*; which I consider to be the true state of the question: I do not know whether it goes very naturally, not to the disavowment of the general proposition, but the preventing the application of it; for it is one thing to say you shall execute specifically, and another to say you shall pay a debt actually contracted.

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It occurred to me whether, if the *East India Company* had stated an account under the agreement in 1781, and reciting they had received so many lacks of pagodas from the revenue, that they had debited him so many lacks, upon which remained a balance of so many pagodas, with or without saying they would promise to pay it; and if the Nabob were to bring an action in the Court of King's Bench, or any other court of law, a plea could be invented to bar that action; whether had it been worded ever so well, it would have applied to that subject; and more particularly, how a plea worded as this is would apply.

I proceed then to consider, whether the plea, as it here stands, has brought it to that point, that this was a convention between two persons acting as sovereigns, *quasi* sovereigns, respecting the public interest represented by them.

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In order to do so, they have pleaded thus:

They have stated, that by divers charters, deeds, and statutes confirming them, they have, among other things, the sole right of trading to the *East Indies*, they are licensed to send ships of war there, or send men or ammunition to their factories for their security and defence, to choose commanders and officers over them, to continue (which is the material part of the plea) or make peace or war with any prince or people that are not Christians, within the precinct of their trade, in all the world beyond the *Cape of Good Hope*, and this Nabob they have stated to be a sovereign prince and an infidel, in the *Carnatic*, within the precincts of their trade.

So far as they have gone in stating his right, and their capacity of making war; this they have done with the view, that from the power of making or continuing war, without any express grant, it will be inferred, that the crown has granted a right to make foederal engagements and treaties; this they have not stated, but have left it to be inferred from the power of making war or peace.

It would have been material perhaps to this point of argument to have averred this, because it will be an important consideration how far those foederal engagements made in *India* will bind the country.

I suppose it is clear that, especially with the concurrence of an act of parliament, where a power is given them by the public to make peace and war, the effect of a peace or war made by them, will constitute the state of peace and war between the sovereign of this country, and the sovereign prince with whom it is made.

If the act had provided to enable them to make treaties, the same argument would probably have concluded, that the power of the country would be bound by such treaties: unless the custom of nations would apply to them, as effectually as it does to persons having full powers. If that were to be determined upon letters or figures only, the parties are fully bound by the signature of their plenipotentiaries, but, till ratification, it is not understood to be a plenary obligation; and therefore, in a treaty with a plenipoten-
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tary, ratification is one of the terms contracted for ; unless, therefore, the custom of nations would apply to a general power, given in this way by charter, if they have power to treat with all sovereign princes, infidels, within the compass of their trade, those contracts would, as foederal engagements, have bound the nation ; but this seems not to be expressly granted to them, but left to me to infer, from their being enabled to make peace or war.

After they have qualified themselves in that manner, they say generally, that all the agreements and transactions in the bill, were done by virtue of the powers before mentioned. I imagine, if it had rested upon that, the powers and licence being of sole trading, it would be difficult to insist, that was not the power under which they attempted to justify.

After they have stated that they were done by virtue of their powers, they proceed to the only material words of the plea, and these are, that they do respectively relate to matters transacted between them in regard to peace and war, and the security and defence of their respective territorial possessions, without saying what was done for one occasion, and what for the other, but leaving it as equally justified, whether it was done on account of peace or war, or for the mutual security of their possessions. Now I have not heard it argued, that these words do not stand distinctively, and that the reliance of the plea is not as much upon the last as upon the first, nor that if it had been confined to the first branch, that from the authority of making peace or war, they would have a right to consider themselves as treating foederatively, where the subject-matter of the treaty was the security of their territorial possessions ; which, being unqualified, may relate to a great many other dangers, than those arising from infidel princes living within the precincts of their trade.

But to keep clear of this, and suppose it confined to transactions that relate to peace and war, is it possible to contend that that general phrase is sufficient to bring it up to the point, that it is a foederal engagement formed by a sovereign, concerning the public interests of the sovereignty ? Will the sum of the words extend to that ? If it would not do so between sovereigns, much less between those who have a limited charter, approaching to sovereignty in no respect, but armed with peculiar powers for their own interest.

In the first part of this plea, where they offer to prove, that they stand in a situation essential to their plea, they say, by charter and acts of parliament they have certain powers, can this be the manner of pleading in a court of justice ? must they not shew *quo modo* ? must they not state the powers given them by the charters ? But the *Attorney* says, that they are confirmed by the act of parliament. The act, in its nature, is a private act, and therefore would be pleaded ; but, I take it for granted, there is a clause at the end, that it shall be a public act. Does it follow that

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that I am to take notice of a power given by charter, and confirmed by act of parliament, as if it was a general law of the realm? I should be glad to hear any case that would bind me in that manner. Therefore I take the plea to be, in that respect, informal.

But the gentlemen, in drawing the plea, have not adverted to the most material consideration, for every plea must tender issuable matter, the truth or falsehood of which may be replied to, or put in issue. If it is to be decided now, here nothing is tendered upon which issue can be taken; and there is no case of a plea of this sort, where general propositions are tendered, by way of plea, in order for issue to be taken upon them.

It therefore seems to me that the plea is bad in every view. There is not sufficient alledged to bring them into the situation to which the argument would apply; and I cannot say, if they were brought into that situation (which I wish they were, because I think it an important point to be considered) I should therefore lean to any application to endeavour to do it; for I cannot take notice of what one privately may think, that the Nabob knows no more of this than of what is passing at *Vienna*. I must consider this as the suit of the Nabob; and, considering it as such, it would be difficult to sever the convenient from the inconvenient; probably a number of inconveniences may arise, let them be what they will, pronouncing on this record: it is impossible to allow this plea, therefore it must be

Over-ruled (a).

On the 30th of the present month, Mr. *Attorney-General* (on the part of the Company) moved for leave to amend the plea, or to plead anew, on account of the novelty and importance of the case; but *Lord Chancellor* refused the motion (b).

(a) The Company afterwards put in an answer, for the proceedings upon which, vide post, vol. iv. 180. 2 Ves. jun. 56.

(b) Upon the subject of amendment of pleas, vide *Newman v. Wallis*, ante, vol. ii. 143.

Lincoln's-Inn
 Hall, 22d July.

MAC ADAM v. LOGAN (a).

Power to the survivor of husband and wife to appoint among children, not well executed by a deed by both.

Where a seal is required by the power, an appointment among children without seal, void.

BY settlement, subsequent to the marriage between *Gilbert* and *Sarah M^cAdam*, £3,000, part of the wife's fortune, were vested in trustees, the defendants *Logan* and *Devaynes*, the interest thereof to be paid to the husband for life, after his decease to the wife for life, if she should survive, and after the decease of the survivor, to divide the same amongst such child or children of the marriage, and in such shares and proportions as the survivor of them, the husband and wife, should, by writing under hand and

(a) Reg. Lib. B. 1790. fol. 514.

seal

seal, appoint, and in default of appointment, among all the children equally (a).

The husband and wife during their joint lives, and having then five children, the defendant, *Christopher Kilby M'Adam*, their eldest son, the three plaintiffs, and a son, since deceased, by deed-poll, signed by them, but not sealed, appointed the £3,000, after the decease of the survivor, to be equally divided among their four younger children, omitting the defendant *Christopher*, their eldest son.

Sarah M'Adam died in the life-time of her husband *Gilbert*, who was since dead.

And the trustees, having some doubts concerning the validity of the deed executing the power, the present bill was filed by the surviving appointees under the deed, against the trustees, and their brother, *Christopher Kilby M'Adam*, praying that the deed-poll might be declared to be a good execution of the power, and that the trustees might pay to them the £3,000.

Christopher Kilby M'Adam, by his answer, insisted, that the deed-poll was not a good execution of the power, inasmuch as the power could not be executed by the husband and wife during their joint lives, but the execution thereof ought to have awaited the death of one of them, and to have been made by the survivor, and also inasmuch as it ought to have been by a deed sealed as well as signed.

Mr. Mansfield and *Mr. Hood*, insisted, for the plaintiffs—that this was a good execution of the power; that being by both, it was executed by the survivor; and that the sealing was such a formality as the Court would supply, this being a power coupled with an interest, *Smith v. Ashton*, 1 Eq. Ab. 345. They observed, that it did not appear but the defendant *Christopher* was otherwise provided for.

Lord Chancellor, without hearing the other side, said—he thought the appointment by the husband and wife, during their joint lives, was not a good appointment under this power; and that it was indifferent whether *Christopher* was or was not otherwise provided for (b).

Upon

(a) The words of the settlement, as they appear in the Register's book, are as follows: to the husband for life, "and in case the said *S. M.* should survive her said husband, then to pay the interest to her, or amongst all and every of such one or more child or children of the said *S. M.* by the said *G. M.* begotten, or to be begotten, in such parts, shares, and at such times, and with such maintenance in the mean time as the survivor of them, the said *G. M.* and *S. M.* by any deed, &c. should appoint," &c.

(b) The reader will find some ingenious observations of *Mr. Sugden*, *Pow. 263, 264*) who, upon the authority of the case of the *Countess of Sutherland v. Northmore*, 1 Dick. 56. S. C. 3 Vin. Ab. 427. nom. *Sclater v. Trarrell*, suggests, that it may still be open to contend, that as the power might be executed by each separately in the life-time of the other, a joint appointment ought to be considered as the separate appointment of the one who survives, and consequently a valid execution of the power. This argument would

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Upon the other point his Lordship seemed to think, that the want of a seal could not be supplied between persons having equal equities, though it may against an heir at law or remainder-man; but, being all children, it is like a naked power; but he decided it upon the former point (a).

would however probably be found untenable. It is founded upon an assumption, (viz. that the power might be executed by each separately, in the life-time of the other,) of which, in the absence of authority in its favour, we may safely doubt: and against which there is a strong intimation of opinion by Lord Ellenborough in the case of *Doe v. Tomkinson*, 2 M. & S. 165. That was a devise of real estate to the testator's two sisters M. and E. or to the survivor of them, and to be disposed of by the survivor, as she may by will devise. M., during the life of E., made a will, devising the property. She afterwards survived E., but died without republishing her will. The above case from *Viner*, had been cited to shew that, supposing this to be a power to the survivor, (of which, from other parts of the will, there was great doubt,) it had been well executed in the life of the other sister. Lord Ellenborough, however, in answer, observed, that the distinction between the cases was, that in the case from *Viner*, the power was given to a designated person, to be executed upon a contingency; in the case before him, it was a power given to a contingent

person. It is to be regretted that the authorities have never been brought together under the consideration of the Court, for as the *Countess of Sutherland's* case was here omitted to be cited before Lord Thurlow, so Lord Thurlow's determination escaped the research of the very eminent person who argued against the execution of the power in *Doe v. Tomkinson*.

The present case has been cursorily noticed in *Bushell v. Bushell*, 1 Sch. & Lef. 96. *Sharp v. Sharp*, 2 Barn. & Ald. 410. Et vide *Townsend v. Wilson*, 1 Barn. & Ald. 608.

In *Simpson v. Paul*, 2 Eden, 34, where there was a joint power to husband and wife, of appointing a sum of money among children, with power, in default thereof, for the survivor to appoint, Lord Northington held, that a partial execution by both, of the original powers, prevented the execution of the secondary power by the wife, who survived.

(a) This opinion on this point, as observed by Mr. Sugden, (Pow. 351) cannot be supported; surrender of copyhold and executions of powers in this respect go hand in hand: as to which vide *Chapman v. Gibson*, ante, 229.

Lincoln's-Inn
Hall, 23d July.

Gift by will of pictures to Lady —; absolutely void, and shall not go to the Master, or be supplied by parol evidence. Bequest of all my clothes and linen whatsoever passes body linen only.

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HUNT v. HORT (b).

MRS. Hewit, by her will, gave her houses in town, and at Richmond, to her dear niece, dame Margaret Hort, and Richard Baker, her attorney, in trust to sell the same; she then gave certain pictures specifically; and the will proceeded, "my other pictures to become the property of Lady (leaving a blank after Lady), my linen and clothes of all kinds, except laces, I give, with £20, to — Scott" (her servant), and made her niece, Harriot Hunt, her residuary legatee, whom she recommended to the care of Lady Hort, and Lady Hort and Richard Baker executors.

The bill was filed for an account, &c. and two questions were raised. 1st. Whether the defendant Lady Hort was entitled to the pictures? 2dly. What linen Mrs. Scott was entitled to, she claiming the table and household linen under the bequest?

(b) Reg. Lib. A. 1790. fol. 521.

Mr.

Mr. *Mansfield* and Mr. *Short*, for the plaintiff, contended—that though it was probable Lady *Hort* was intended to take the pictures, yet her name being omitted, could not be supplied by parol evidence; for though parol evidence had been received, where a person was named by a wrong name, yet there was no case where a blank had been supplied, *Baylis and Church v. The Attorney-General*, 2 Atk. 239. and that as to the bequest to Mrs. *Scott*, the word “linen” being connected with “clothes,” only body linen, not table or bed linen could pass.

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Mr. *Steele* for Lady *Hort*, contended—that on the face of the will Lady *Hort* was entitled; that in the opening of the will she has given every thing to dame *Margaret Hort*, and *Richard Baker*, in trust, then having given four pictures specifically, she directs the others to become the property of Lady ; there cannot be a doubt, she meant Lady *Hort*, who is the only person of title mentioned in the will. She afterwards calls her Lady *Hort* in the appointment of executors. At least, Lady *Hort* is entitled to a reference to the Master, to enquire who was intended, and parol evidence of the testatrix's intention will be admissible. In *Masters v. Masters*, 1 P. W. 421, Mrs. *Masters* had left a legacy to Mrs. *Sawyer*, when there was no such person known to her, but it was alledged she meant one Mrs. *Swopper*, it was referred to the Master to enquire whether Mrs. *Swopper* was intended, and if the Master should find she was, she was to receive her legacy.

Mr. *Mitford*, for the defendant *Scott*, contended—that she was entitled to all the linen of every kind; that if it had been meant to confine it to body-linen, the word “linen” was superfluous, as that would have passed by the word “clothes.”

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Lord Chancellor.—As to this point, it was clear that connecting the word “linen” with “clothes,” shewed what was the intention.

As to the former point, his Lordship had more doubt whether the first gift of the whole being to Lady *Hort* in trust, and then part of the pictures being taken out, and the remainder to become the property of — (in opposition to a trust) he could not supply Lady *Hort*'s name, even without referring it to the Master; but upon consideration he said, he could not supply a blank by parol evidence; and that where there is only a title given, it is the same as if it was a total blank; that by a blank added to a general legacy, no person is referred to, and therefore he thought it would be too much to give it, thus, to Lady *Hort* (a).

(a) In *Abbot v. Massie*, 3 Ves. 147, upon a legacy to Mrs. G. evidence was admitted: as to mistakes in the names

of legatees, vide *Delmare v. Rebello*, post, 446.

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Lincoln's-Inn
Hall, 24th July.

Bankers receive and pay money on account of a bankrupt, after notice of an act of bankruptcy; all the sums received, are so to the use of the estate, and they cannot set off the payments made, or be allowed to come in as creditors, and to claim dividend on debts paid which were owing before the act of bankruptcy.

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HANKEY and Others v. VERNON and Others.

THE bill stated that the plaintiffs were bankers, and that *Elizabeth Tyler* employed them as such, in the way that merchants and others usually employ bankers, and being threatened with an indictment for perjury, quitted her house on *Tower Hill*, on the 2d or 3d *May*, 1785, and went abroad to *France*; that she afterwards returned, and carried on business as before, till the beginning of *February* 1786, and continued to make use of the plaintiff's banking-house, they knowing the reason of her absence, and not suspecting that her going away could be deemed an act of bankruptcy; and between the 18th *May*, 1785, and *March* 1786, she paid into plaintiff's shop £9,616. 8s. 9d. and during the same time, plaintiffs paid in discharge of her drafts, and otherwise on account of her and her estate, £9,679. 5s. 4d. which left a balance in favour of plaintiffs of £62. 16s. 7d.

The defendant *Vernon*, about the 9th *March*, 1786, sued out a commission of bankruptcy against *Elizabeth Tyler*, and she was found a bankrupt, upon proof of an act of bankruptcy committed by her; and the defendants and plaintiff *Thomas Hankey*, were chosen assignees.

The defendants afterwards brought an action against the plaintiffs, (the plaintiff, *Thomas*, waiving the objection of his being an assignee) for the sum of £9,616. 8s. 9d. paid by *Elizabeth Tyler* into the hands of the plaintiffs after her return from abroad; and the plaintiffs pleaded the general issue, and gave a notice of set-off. The action came on to be tried at the sittings after *Trinity term* 1787 (a), and the defendants giving evidence of some of the creditors of *Elizabeth Tyler*, having, in her absence in 1785, called for payment of some bills, and that she had, soon after her return, given a security to Messrs. *Thackeray* and *Hanson*, (who in her absence had sued out a commission of bankruptcy against her, but had suffered the same to be superseded) for a debt owing from her to them; and insisting, that in point of law, all the money which had been received by plaintiffs for said *Elizabeth Tyler*, after her return, was to be considered as received for the use of her assignees; and that the defendants were not at law entitled to be allowed, by way of set-off, their payments, made by them in the course of their business as bankers; the jury found a verdict against the plaintiffs for £16,930, (being the amount of all the money received by plaintiffs after *Elizabeth Tyler*'s return, and in which the sum of £9,616. 8s. 9d. was included.) This verdict having been taken, by mistake, for too large a sum, was reduced to £14,865. 19s. 5d. for which sum, with the costs, amounting to

(a) 2 T. R. 113.

£15,087, judgment was entered up, and the plaintiffs afterwards satisfied that judgment, without prejudice to any right which they might have, in equity, to a satisfaction out of the bankrupt's estate, in respect of such parts of the sum of £9,679. 5s. 4d. to which they were entitled to a satisfaction; and the defendants afterwards made a satisfaction to the plaintiffs, as to some part of that sum.

Amongst the sums amounting to £9,679. 5s. 4d. on account of *Elizabeth Tyler*, paid by plaintiffs after 2d May, 1785, and before the issuing the commission of bankruptcy, were several sums paid to persons to whom *Elizabeth Tyler* was indebted before the 2d May, 1785, and which debts the respective creditors would have been entitled to prove under a commission of bankruptcy, if one had been issued in consequence of her going to *France*; or to have proved the same under the commission of 9th March, 1786, in case such debts had not been paid, particularly debts amounting to £2,844. 8s. 3d. and dividends having been made to the amount of 7s. 6d. in the pound, the plaintiffs applied to the defendants to be permitted to stand in the place of the creditors so paid, and to be paid a dividend thereupon, rateably with the other creditors: which being refused, the present bill was filed for that purpose.

The facts were admitted by the answers of the defendants, but the equity of the case was denied, by reason the payments were made by the plaintiffs after notice of Mrs. *Tyler's* having committed an act of bankruptcy.


Mr. *Hardinge*, Mr. *Graham*, and Mr. *Hollist*, admitted—that the plaintiffs had notice of the act of bankruptcy at the time they made the payments, and that they had paid the money in their own wrong; but contended that they had, nevertheless, an equity to stand in the place of those creditors who were rightfully paid. If the plaintiffs had paid the creditors with their own money, they would have had a right to be paid the distributive share that the creditors themselves could have claimed, why should they not now be permitted to stand in their place? which is all that is prayed by this bill. It may be compared to those cases, where a fund having been applied which is not liable, and there is a fund liable to the payment, restitution shall be made, by the liable fund, for the money paid.

But Lord Chancellor (without hearing the other side) said—that though this was a hard case, there was no such equity, the plaintiffs having notice of the act of bankruptcy, and

Dismissed the bill (a).

(a) Vide *Hankey v. Vernon*, 2 T. R. 113. 2 Cox, 12.

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Hall, 27th July.

By marriage settlement £1,000 was to be laid out to the use of the wife for life, with remainder, in case she should survive, to her; and if the husband should survive, then to such uses as the wife should appoint; in default of appointment, to such person as the same would have gone unto by the statute of distribution, in case the wife had died unmarried. She died without appointment, leaving a daughter. The father gave to the daughter a real estate in fee, in performance of the covenant. This is a case of election, but the daughter electing to take under the will, takes the personalty as next of kin.

HOARE v. BARNES.

BY settlement 29th June, 1767, previous to the marriage of *George Hoare* with *Amy Dewdney*, father and mother to the plaintiff, to the intent that £1,000, part of her fortune, might be secured upon the trusts therein expressed, the said *George Hoare* did thereby covenant, promise, and agree, with *Charles Dewdney*, the father of the intended wife, that the said sum of £1,000 should, as soon as conveniently might be after the marriage, be placed out at interest, on good securities, or be laid out in lands, in trust, that the said *George Hoare* should receive the interest and profits for life; and in case *Amy Dewdney* should survive her intended husband, in trust, that *Charles Dewdney* should pay the said sum of £1,000, with the interest from the death of *George Hoare*, to the said *Amy Dewdney*, and if the same should be laid out in land, should convey the land to her; and if *George Hoare* should survive his intended wife, that *Charles Dewdney* and the executors of *George Hoare* should pay the said £1,000 or convey the lands to be purchased therewith, unto such person or persons, and in such manner as *Amy Dewdney* should, notwithstanding her intended coverture, appoint by her last will and testament, or any other writing; and in default of such appointment, then that *Charles Dewdney*, and the executors of *George Hoare*, should pay the said £1,000 to such person or persons as the same would have gone, and been payable unto, by the statute of distributions of intestates' estates, in case the said *Amy Dewdney* had died sole and unmarried; or if the same should be laid out in lands, then the same to be to the use of the said *Amy Dewdney*, her heirs and assigns for ever, and to be conveyed accordingly.

The marriage took effect, and *George Hoare* received a much larger sum than £1,000, which he applied to his own use, and did not lay out the said £1,000, or any part thereof, upon any securities, or in the purchase of lands. *Charles Dewdney*, the father of *Amy*, died in 1771, and in 1772 *Amy*, the wife of *George Hoare*, died without making any appointment, leaving the plaintiff, her daughter, and only child by the said *George Hoare*, surviving her.

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George Hoare afterwards made his will, dated 26th September, 1783, thereby reciting the settlement, that the £1,000 had not been laid out, and also the death of his wife without having made any appointment; therefore, for securing the £1,000 to the plaintiff, and in lieu of the performance of his covenant, he gave and devised to the defendants all his freehold and copyhold estates, subject to an annuity of £20 to his (second) wife, for life, in trust, after payment of the annuity, to pay and apply the rents and profits towards the maintenance of the plaintiff, until she should attain

attain

the age of twenty-one years, and when she should have at twenty-one, to grant, surrender, and convey the premises to her heirs and assigns for ever, subject to the annuity; all premises would be worth considerably more than £1,000.

The plaintiff should die under twenty-one, leaving issue, in trust for the benefit of such issue. And after giving certain specific and pecuniary legacies, the testator gave and bequeathed all the residue of his personal estate to the defendants, to pay the same out at interest, and pay and apply the interest, and the principal, unto and for the benefit of the plaintiff and her heirs, in the same manner as his trust estates were directed to be paid and applied: and appointed them executors. The testator died on the 7th August, 1785.

On the 27th December, 1790, the plaintiff attained her age of twenty-one years, and applied to the executors for a conveyance of the real estate, and an account of the personal estate of her mother, which they refused on account of the plaintiff's mother having made no appointment of the £1,000, and having left relief for her own family besides the plaintiff, by which means they did not know to whom the sum of £1,000 belonged. Upon which a bill was filed, by which the plaintiff prayed a conveyance of the real estate, an account of the rents and delivery of the same, relative thereto, an account of the personal estate, and payment of the residue thereof.

The executors, by their answer submitted, whether the £1,000 should remain a debt upon the estate, for the benefit of the next of kin of *Amy Dewdney*, exclusive of the plaintiff; in which case, it would nearly exhaust the personal estate in their hands.

Mitford, for the plaintiff, argued—that it could not be the intention of the settlement in any case to exclude a child of the plaintiff; it could have intended the provision only in default of

Solicitor-General, for the defendants—stated the doubt of the court as to the executors to be, whether the child was put to an election. According to the literal sense of the words of the settlement, *Amy* should not have a child (a); and the persons who would take if she died

is a mistake, though adopted by the court, for the meaning of the words in the settlement, in case the plaintiff *Dewdney* had died sole and unmarried, is not, as supposed, in case she died without having ever been married, for the £1,000 was not to be paid until after marriage, and then the words of the settlement are very plain and expressed and sensible, if taken

in the strict literal sense, and are these, viz. that if the intended wife should survive her husband, she should have the £1,000, but if she died in his life, then it should go to such person as the wife should appoint; or if she made no appointment, then it should go to such person as it would have gone to if she had survived the husband, that is, it should go to all her next of kin, except her husband, in the same manner as her

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died sole and unmarried, were her uncle and others, who were her next of kin.

Lord Chancellor said—it could not be in contemplation in a marriage settlement, that the wife should die unmarried; he therefore declared, that the plaintiff, making her election to take under the will, was entitled to the real estate, instead of the £1,000 and also to the personal estate.

her personal estate would have done, if she had survived and died intestate; therefore the decree is clearly right and agreeable to the strict words as well as the intention of the settlement, unless, which probably was not the case, the £1,000, or some part of it was wanted to pay the legacies in the will; if that had been the case, this £1,000, or so much as was wanted for legacies ought to have gone to the legatees, and that is clearer than the determination in *Streetfield v. Streetfield*, Forr. 176. and in the present case the condition is expressed, and the next of kin are not to be more favoured, with respect to the personal,

than the heir with respect to the real estate; on the whole, the words which were thought extraordinary, only impart, if taken literally, that the intended husband should not have any benefit from this £1,000, unless the wife appointed it to him, notwithstanding he survived her; but that it should go in the event of his surviving her, and there being no appointment, not to him as it would, if there had been no such provision but to her posterity, if she left any, or if she left none, then to her collateral relations, according to the statute of Distribution, as if she had not died under coverture. (Sesq. Hill's MSS.)



Lincoln's-Inn
Hall, 27th July.

TAWNEY, Knight, v. CROWTHER (u).

An agreement having been made, and reduced into writing, but not signed; and letters having passed between the parties referring to the agreement, in which the defendant had said "his word should be as good as any security he could give," this takes it out of the statute of Frauds, and he shall be compelled to perform the agreement.

THIS cause, which came on before, upon a plea of the statute of Frauds, (vide ante, p. 161.) now came on to a hearing, the statute being again insisted upon by the answer.

Mr. Solicitor-General, *Mr. Mitford*, and *Mr. Abbot*, for the defendant, now contended—that the letter written by the defendant, had not such reference to the prior agreement, as to make it an agreement in writing, under the statute of Frauds. They insisted, that the agreement was incomplete, and open to fresh terms to be proposed till *Michaelmas*, and that this was the meaning of the defendant, when he said "there was time enough till *Michaelmas* to settle every thing." They cited the case of *Webb v. Stevenson*, and that of *Stokes v. Moore*, in *Mr. Cox's* note on *Hawkins v. Holmes*, 1 P. W. 771. (b) to shew that unless the written agreement, coupled with the parol agreement, made one complete agreement, it would not take the case out of the statute; and that it did not sufficiently appear that *Crowther*, by signing the letter,

(a) Reg. Lib. A. 1790. fol. 561, plaintiff's name by mistake *Tawley*.

(b) Since reported, 1 Cox, 219.

meant

meant to sign the agreement. They said, that it had been held, that letters, though signed, were not sufficient agreements within the statute. That in the case of *Whaley v. Bagenal*, 6 Bro. P. C. 52. there was a letter under the hand of the party, but not held sufficient. So was the case of *Maxwell v. Montacute*, 1 P. W. 618. which was a promise to do a future act, and held insufficient. Where there are two writings, the latter, in order to operate, must be an adoption of the former. The phrase, "that his word was as good as his bond," only amounts to a promise to come to *Oxford*, and treat further; especially as the first time it was used it followed an express refusal to sign, and must be taken the second time in the same sense. It did not amount to a promise to sign the instrument. If this case succeeds, every negotiation may be raised to a binding bargain; and the party will, in this case, be bound to a bargain he never meant to make.

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Mr. Mansfield, for the plaintiff.—This, is substantially, an agreement in writing. There have been many cases where letters have been held to amount to agreements. The only use of the parol evidence is, to shew what the agreement was; and then, if the paper which is signed refers to that agreement, it is enough. In this case, it is not disputed that an agreement was put into writing, and kept in *Crowther's* custody.

The cases are so loosely stated, that one cannot reason from them. In *Webb v. Stevenson*, it never amounted to a binding agreement. In *Brodie v. St. Paul (a)*, the agreement referred to something that never was in writing, it did not appear what covenants were read. In *Whaley v. Bagenal*, the letters expressed no terms. In *Lord Montacute's* case, it was the same; but upon the whole of this case the letter is, in effect, a promise to perform the agreement.

Lord Chancellor.—The question turns on two points, 1st. As it stands under the statute of Frauds; 2dly. Independently of the statute. And 1st. As to the statute of Frauds, it is an easy question taken by itself. A good deal of ingenious argument has been made use of, to prove that the letter is insufficient to take it out of the statute of Frauds. If the letter contains the terms of the agreement, or if it refers to another paper which contains the terms, that is sufficient; for I am of opinion, that if a letter refers so clearly to an agreement, as to shew what was meant by the parties, where the existence of the paper is proved by parol, that will take the case out of the statute. Then how is the fact? *Crowther* writes a letter referring to a paper in his own possession, and promises to perform; such a letter would be sufficient to draw

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(a) 1 Ves. jun. 526.

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them from the objection, that the promise is not in writing (a). Then, independent of the statute: if a letter, *now*, will bind the party; before the statute, a parol agreement would have been binding. The question is, whether here is sufficient to raise a contract that will bind. If the letter cannot be referred to the agreement, or does not contain proper terms, I cannot treat it as out of the statute; but, I confess, on what appears here, the papers do refer to that agreement, and contain a promise to perform it; the defendant did intend, by the letter, to raise a confidence that the agreement should be performed. [His Lordship here stated the facts.] If he had meant only to treat further, it would not have taken it out of the statute, being only *ad referendum*; but no doubt he meant to refer to the agreement, which had been reduced to writing, and which he had carried away with him. The question is, whether the writing referred to in *Morell's* letter, was that which he wished to be signed; I think it was; then *Crowther* said, he would call on him. He admits, that on the day he thought he should be there, he would call; he does not deny it was for the purpose of signing the agreement. This, if it refers to the agreement, is sufficient; and I think it does. There is evidence in the cause of the parol agreement, which refers it to the head of cases where evidence is admitted of what passed by parol. It is argued, that he took time till *Michaelmas* not to complete the former, but to make a further agreement; it is true, the conveyance was to be at *Michaelmas*; then what are his words? "my word shall be as good as any security I could give." The signing the paper was the security pointed to. On the whole matter, therefore, he has agreed, by writing, to sign it. Several cases have been cited, and it has been argued, that he declined to sign it. If he had said he never would sign it, he could not have been bound; but if he said he never would sign it, but would make it as good as if he did, it would be a promise to

(a) This case, as well as *Allan v. Bower*, ante, 149, have been much doubted. Lord *Redesdale's* observations upon them, are contained in the note to that case; of the present he says, "where a man said he would not sign a paper, Lord *Thurlow* considered this tantamount to a signature."

The doctrine upon the subject, is thus stated by Lord *Eldon*, in *Coles v. Trecothick*, 9 Ves. 250. though the agreement is not signed, if the letter contain all the terms and describes the consideration, and all the circumstances, so that by the contents of the letter, it can be connected and identified with the agreement; that letter, which not only is not a signature, but is the last of all things that can be cal-

led signing the agreement, is a writing signed, which ascertaining the contents of the agreement, amounts to a note or memorandum of it, and therefore satisfies the statute. But the Court will not decree performance, unless it can be collected from a fair interpretation of the letters that they import a concluded agreement, nor if it be doubtful whether what passed was merely treaty. *Fowler v. Freeman*, 9 Ves. 315. *Rose v. Cunningham*, 12 Ves. 550. *Huddleston v. Briscoe*, ib. 591. *Stratford v. Besworth*, 2 Ves. & Bea. 341. *Card v. Jiffrey*, 2 Sch. & Lef. 384. *Ogilby v. Follamhe*, 3 Meriv. 62. See also the cases collected, Sugd. Vend. & Purch. 74, et seq.

perform

t; if he said he never would sign it, because he would er himself by an agreement, it would be too perverse to ed; but here I am of opinion, that the agreement must med (a) (b).

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Alvanley, in *Forster v. Hale*, alluded to the circumstance the decree having been consent, but Mr. *Lloyd* and men at the bar, informed ough the terms were taken the point was adversely

fident of his opinion, and intimated that he did so, to secure against an appeal, the property being but small;" his Lordship adds, "this shews that he did consider that as a doubtful case, otherwise it would be extraordinary that the defendant should have his costs where he was wrong. However, Mr. *Browne* has not taken notice of that circumstance, which I am sure was as I have stated it." This is however not stated in the Register's book, where costs appear to be given only to *Morrell*, the trustee.

Redesdale, in *Clinan v. ch. & Lef. 34*, observed, *Hurlow* gave the defendant ovided he consented to de- session within a certain ds, "his Lordship was dif-

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(Exceptions to the Master's report of costs.)

had been ordered, by the decree, to be paid to the iff, as to so much of the bill as related to the sale, and ies, &c. (see the case reported, ante, vol. ii. p. 400.) luded the costs of the defendant *Garforth*. ethod by which the Master did this, was to examine of the proceedings related to the defendant *Garforth*, found to be one-sixteenth part; he then taxed the costs ole suit, and deducted one-sixteenth part as the costs of and reported the remainder due from the defendant

Exceptions are not regularly taken to the Master's report for costs only, but should be by petition.

de of liquidation had been consented to, or at least ac- 1, at the Master's chambers.

w, on exceptions to the Master's report—*Lord Chan-* an exception had never been admitted for costs only, egular method was to state the articles the party meant o in a petition, and to pray leave to except; where there ice as to costs of a particular part of a cause, the Mas- kamine what relates to that part.

e, the party having consented at the Master's chambers, le of taxation adopted as the most convenient, could not except; therefore his Lordship over-ruled the exception, rits.

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There were other exceptions to sums allowed by the Master, which were also over-ruled (a).

(a) In *Holbecke v. Silvester*, 6 Ves. 417, it was stated to be the practice, that though there cannot be an exception for costs only, yet if the party except upon any other ground, he may add an exception for costs. In *Lucas v. Temple*, 9 Ves. 299, however, Lord Eldon expressed his doubts of this distinction, observing, that frivolous exceptions would be taken, merely for the sake of the costs. The inference from these cases is, that where an ob-

jection is made to the taxation of costs generally, the course of practice is to except in the first instance; where the objection is to the allowance or disallowance of *items*, there must be a petition for leave to except, 2 Turn. & Ven. 145. See the practice alluded to in *Purcell v. M'Namara*, 12 Ves. 170, by which, if leave were granted, it would have the effect of confirming the exception to the particular items objected to.

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Lincoln's-Inn
Hall, 1st Aug.

The testator having two estates in mortgage, orders the debt upon one to be paid out of his personal estate, and charges the other upon the mortgaged premises, and gives the residue of his personal estate to persons by whose deaths it afterwards lapses: The mortgage debt charged upon the mortgaged premises, shall be paid out of the personalty; for, though he exonerated the personal estate for the legatees, *non constat* he meant so to do for the next of kin, and it is as if he had said nothing of his personal estate; in which case a mere gift of the mortgaged premises, subject to the mortgage, would not exempt the

HALE v. COX (a).

WILLIAM HALLET, late of *Wolverhampton*, mortgaged certain premises, called the *Millstones*, to *Thomas Robins*, for securing the sum of £300, and afterwards died, having made his will, dated 22d *June*, 1782, and thereby directed, that all principal money and interest, which should be due and owing from him at the time of his decease, on a mortgage of the messuage, &c. situate in *Piper's Row* (other premises then in mortgage), and all other his just debts and funeral expences, should be fully paid and discharged out of his personal estate, he gave several legacies, and then gave and bequeathed the rest and residue of his said personal estate to *John Bradney* and *Obadiah Parker*, in trust, to cause a true inventory to be made thereof, and to protect and preserve the same in the best manner they should be capable of, for *John Mintridge*, until he should attain his age of twenty-one years, and then, in trust, for the proper use and benefit of the said *John Mintridge*; but if the said *John Mintridge* should happen to die under the said age of twenty-one years, unmarried, and without lawful issue, then in trust for *Mary Mintridge*, when she should attain her age of twenty-one; he then gave real estates to the same trustees, upon trust, for the benefit of *John* and *Mary Mintridge*, and then gave all other his messuages undisposed of, and which included the premises in mortgage to *Robins*, to the same trustees, in trust, if they should think proper, to *sell and dispose of such his said messuages, &c.* as should be on mortgage at the time of his

(a) Reg. Lib. A. 1790. fol. 635.

decease,

decease, and after payment of all principal monies and interest, that shall or may be due on any such mortgage, he directed the trustees to place out the remaining part of the purchase money at interest, on securities, and to pay the interest to his daughter *Catherine Jones*, for life, with remainder for the benefit of her children; he then gave his trustees discretionary powers, with respect to the mortgaged premises, if they should think proper to continue them in mortgage to the then mortgagee, or to borrow money of other persons on mortgage thereof, the rents and profits thereof, in that case (after payment of interest, &c.), to be to the same uses, with an ultimate remainder to his own right heirs, and appointed his trustees executors of the will. The testator died soon after, leaving *Catherine Jones* his heir at law, and also his next of kin; *Bradney* and *Parker* proved the will, but are since dead, having made some of the other defendants their executors, and *Parker* surviving, left others of the defendants his heirs at law, in whom the legal estate in the premises devised by the will is vested.

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John Mintridge and *Mary Mintridge*, both died under twenty-one years of age, in the life-time of *Catherine Jones*, who has five children also defendants.

The executors of the mortgage filed the present bill, praying, among other things, an account of the personal estate of the testator, and if it should appear insufficient to pay what should be found due in respect of the mortgage, that the deficiency might be raised by sale of the mortgaged premises, or other parts of testator's real estates.

Mr. Solicitor-General stated it, as being a question among the defendants—whether the direction, with respect to the personal estate, should be that it was liable to debts, with an exception of that charged upon the mortgaged premises given to the testator's daughter *Catherine Jones*, or that gift could be considered as any more than the common case of a gift of mortgaged premises, subject to the mortgage money, which would leave the personal estate liable.

Mr. Campbell (who was both for Mrs. *Jones*, the heir at law and next of kin, and also for her children) said—A question might arise between her and the children, as if the mortgaged debt fell upon the personal estate, which in the event was undisposed of, and devolved upon her as next of kin, she must bear the whole; if it remained a charge upon the mortgaged estate, that was given to her for life only, and the charge would be upon the inheritance alone; but she was satisfied to take it in the way most beneficial to her family.

The residue of the personal estate was given to the trustees, to preserve the same for *John Mintridge*, until he should attain

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twenty-one, and was then given to him; he died under twenty-one; so that this gift was lapsed; then it was given to *Mary Mint-ridge*, when she should attain twenty-one, which is like the cases of legacies given at twenty-one, and which are considered as not vested; if so, it is undisposed of, and Mrs. Jones must take it as next of kin.

Lord Chancellor.—In this case the testator has been very anxious to give no real estate till after the payment of the debts; he proceeds, that if it be more convenient for the family, the mortgaged estate shall not be sold, but other money borrowed upon it to pay the mortgaged debt. Is it possible then to throw the debt upon the personal estate? Can it be construed that he intended it to be sold, and that so much as is more than the £300 should go to the legatee; that the £300 mortgage-money should be paid by the personal estate, and the £300, which continues real, descend to the heir at law? It would be too much to attribute this intention to him. Upon the whole of the will, it seems that he meant the personal estate should pay the other mortgage; but as to this, that it should be exonerated for the benefit of the legatees.

But although the intent was, *that the legatee should take the personal estate, exempted from the mortgage debt*, it does not follow that *the next of kin shall take it so*. The legatees being dead, it is the same thing as if he had said nothing in his will about his personal estate. It must devolve in the ordinary way, as if it stood without any expression of a desire to exempt the personal estate; and then the personal estate must be applied (a).

(a) This is probably the case alluded to by Lord Alvanley, in *Waring v. Ward*, 5 Ves. 675. In that case also, where there was a bequest of personal estate, exempt from debts by mortgage, the benefit of the exemption was held to be confined to that legatee; his Lordship said, that upon principle nothing is more clear than that, if there is any gift in favour of a particular legatee, and he dies, no benefit that legatee could have claimed if he had survived, can be set up against the persons to whom the estate would come, subject to the disposition in favor of that legatee if he had lived. If, for instance, an estate had been given to A. and the personal estate to B. exempt from debts, that exemption is to be considered as intended only for the

benefit of B. that he shall not pay those debts to which he would be liable, if no such provision had been made. His Lordship considered the determination in *Pickering v. Lord Stamford*, (post, vol. iv. 214. 2 Ves. jun. 272. 581. 3 Ves. jun. 352. 492.) as very analogous in principle, that nothing was clearer than that where an exemption was created for the benefit of a particular person, not for the benefit of the estate generally, if that person cannot take it, the benefit never arises. The Editor believes that a case of *Noel v. Lord Henley*, has lately (Trin. 1819) been determined by the Lord Chief Baron, upon the same grounds, which, however, it is understood will be carried to the House of Lords.

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MARTIN v. WILSON (a).

Lincoln's-Inn
Hall, 1st August.

THE testator made his will, 19th May, 1777, and thereby gave his real and personal property, in eight parts, to eight cousins, and their issue. With respect to five of the shares, he made the following provision, in case *the said Elizabeth Underwood, Mary Underwood, Robert Underwood, Thomas Underwood, and Elizabeth Berrick*, or either of them, should die without leaving issue, then I give and bequeath the part or share of him, her, or them, so dying without issue, of and in the said principal money, which his, her, or their respective child or children, if they had any, would have been entitled to, *unto the children of my late cousin, William Underwood and John Underwood, equally share and share alike*, to be paid to them at their respective ages of twenty-one years, and the interest thereof to be applied, in the mean time, at the discretion of my executors, for their maintenance and education.

Gift of a share over, to the children of my late cousins *W. U. and J. U.* share and share alike, at their respective ages of twenty-one: this is a tenancy in common among those then living: and one of them dying in the life-time of the testator, that share is lapsed.

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Upon this cause coming on before, for further directions, it had been declared, that *Elizabeth Underwood* ought to be considered as having died in the life-time of the testator. At the time of making the will, *William Underwood* had one child, a daughter, named *Sophia*, who afterwards died in the life-time of the testator. *John Underwood* also had one daughter at the time of making the will, *Harriet*, the wife of the defendant *Wilson*, who survived the testator, and was his heiress at law, but who had died since his decease, and her husband, the defendant, had taken out administration to her.

The cause came on now for further directions, and the question was, who was entitled to the funds in court, to which *Elizabeth Underwood* would have been entitled, had she been living at the death of the testator.

Mr. Solicitor-General, for the defendant *Wilson*, contended—that *Harriet*, his late wife, as survivor, would take the whole. The gift was to the children of his cousins, and would have admitted any children of *Elizabeth Underwood*, who should have been born before the death of the testator, or before her death, if she had survived him; therefore it did not vest till the death of the survivor of the testator, or *Elizabeth Underwood*; and there being, at the death of the testator (who survived) but one child living of *John*, and no child of *William*, it must vest in that only child of *John*.

(a) Reg. Lib. B. 1790. fol. 615.

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Mr. *Mitford*, for the plaintiff, contended—that the words “children of his cousins *William Underwood* and *John Underwood*,” must mean those who were so at the time of making the will : and that it was the same as if he had named them *Harriet* and *Sophia Underwood*. That in this case, no survivorship was given between them ; therefore *Harriet*, as survivor, could only take a moiety ; and the other moiety (of so much as was personalty) would be undisposed of.

And *Lord Chancellor* was of opinion, that this was a tenancy in common from the making of the will, and that so much as was the produce of the real estate, vested in *Harriet*, as heir at law of the testator ; and the moiety of that which was produced by the personalty, goes to the personal representative of the testator (a).

(a) This case seems to be contradicted by many of the determinations upon devises to children, &c. as a class.

They are collected in a note to *Andrews v. Partington*, post, 401.

Lincoln's-Inn
Hall, 3d August.

The plaintiff's testator's property in *America* being confiscated, subject to his debts, a creditor there, ought first to apply to make that property available to payment of his debt, before he sues him personally here.

WRIGHT v. NUTT, and Another.

THE case made by the bill was as follows :—

“ That Sir *James Wright*, deceased, was for many years before, and in the year 1774, and from thence to the acknowledgment of the independance of the United States of *America*, Governor of the then province of *Georgia*, in *North America*, and constantly resided there till the troubles in that country commenced ; in the course of which residence he acquired very considerable property in the said province, consisting of plantations, negroes, cattle, and other effects on his said plantations ; that in the course of managing and cultivating the said plantations, Sir *James Wright* purchased of *Miles Brewton*, of *South Carolina*, certain negro slaves, at the price of £8,802. 5s. current money of *South Carolina*, being of the value of £1,300 sterling, or thereabouts, for which he gave the said *Miles Brewton* his promissory note, payable at a future day :

“ That the disturbances in *America* having soon after commenced, and the persons who opposed the *British* authority, having assumed to themselves the government of the said province of *Georgia*, Sir *James Wright*, and the other persons who remained loyal to *Great Britain*, were obliged to fly from the said province ; that Sir *James Wright* left behind him the whole of his property, to a considerable amount, and, amongst the rest, the several slaves which he had purchased as aforesaid ; that the persons who, on that occasion, assumed the government, and established themselves in

in the province of *Georgia*, in the month of *March*, 1776, passed an act of assembly in the State of *Georgia*, intituled, "An act for attainting such persons as are therein mentioned of high treason, and for confiscating their estates, both real and personal, to the use of that State, for establishing boards of commissioners for the sale of such estates, and for other purposes therein mentioned;" and it was thereby enacted, that Sir *James Wright*, and one hundred and fifteen other persons, should be attainted, and adjudged guilty of high treason, and should be liable to the several penalties therein mentioned; and that all the land and heritages, debts, goods, and chattels whatsoever, of such persons, within that State, should, according to the several estates and interests which the persons so attainted had therein, be deemed, and were thereby enacted, and declared to be, in the real and actual possession of the government thereof, without any office of inquisition; and to the end that all the estates of the persons thereby attainted, and the incumbrances thereon, might be the better discovered and ascertained, and that the same might be applied to the uses of the State: it was enacted, that five persons should be appointed, in manner therein mentioned, to act as a board of commissioners for each county within the said State, who were to sell all the real and personal estate of the several persons named in the said act, and the monies arising by such sales were to be paid into the treasury of the said State; and that all persons having any demands on the forfeited estates, were to lay their claims before the board of commissioners; and after liquidating all such claims on the said forfeited estates, the said board of commissioners was to empower the sheriff of the county, or any persons they might appoint, to sell the estates of the attainted persons, both real and personal, after giving thirty days, at least, public notice; and then to sell by public auction, for the money of that State only, and to the inhabitants, being actually citizens and residents of and within the same; and the persons having any claims or demands on the estates of the attainted persons, were to make the same before the expiration of sixty days after the passing of that act, or to lose their claims; that possession of all the effects of Sir *James Wright* was taken under, and by authority of the said act; that *Miles Brewton*, being a citizen or inhabitant of the said province of *South Carolina*, and a friend to the United States of *America*, and inimical to the government of *Great Britain*, became entitled to claim, and be paid out of the confiscated estates and property of Sir *James Wright*, the money due to him upon the said promissory note, and that he actually made some claim in respect thereof; but before any thing had been done towards liquidating the same, and in or about the month of *December* 1778, possession was taken of the said province of *Georgia* by the king's troops, and the province was reduced under the *British* government; whereupon Sir *James Wright* was ordered to return to the said province, and resume his

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his government there, which he accordingly did; that, upon his return to the said province, he regained possession of his plantations and hereditaments within the said State, but some parts of his property upon the said plantation had been sold, under the authority of the said act of assembly; that Sir *James Wright* continued in possession of his government until the month of *June* 1782, during which he continued to cultivate, and greatly improved his said plantation; that his Majesty's troops evacuated the said province of *Georgia* in the month of *July* 1782; and in consequence thereof Sir *James Wright*, and the other persons who had adhered to the *British* interest in the said province, were again compelled to fly from it, and leave all their landed property, and most of their effects: that some time before the evacuation of the province, the inhabitants of the *American* interest declared the province of *Georgia* to be an independent State, and chose from time to time an House of Assembly of their own, as the legislative body for the said State; and by an act passed by the House of Assembly on the 4th of *May*, 1781, intituled, "An act for inflicting penalties on, and confiscating the estate of such persons as are therein declared guilty of treason, and for other purposes therein mentioned; reciting the former act, and that it was necessary to carry the same into full execution," it was enacted, That Sir *James Wright*, and many other persons therein named, should be, and were thereby banished from that State for ever, and if they returned to that State, should be guilty of felony without benefit of clergy; and that all the estates, both real and personal, of all the said persons, with all debts, dues, and demands whatsoever, due to them, should be confiscated to the use and benefit of that State; and the monies to arise from the sales which should take place by virtue and in pursuance of that act, should be applied to such uses as that legislature should direct; and that all debts, dues, and demands, due or owing to merchants or others residing in Great Britain, were thereby sequestered, and the commissioners appointed by the said act, were thereby empowered to recover, receive, and deposit the same in the treasury of the said State, in the same manner as debts confiscated, there to remain for the use of the said State; and reciting, that there were several just claims and demands, which might be made by the good and faithful citizens of that State, and others of the United States of America, against the estates confiscated by that act; it was enacted, that any persons well affected to the independence of the United States, having debts owing them from the persons named in that act, or who had any just claim in law or equity against any of such confiscated estates, should bring his claim, or enter his action, within the space of twelve months from passing of that act, and in default thereof, every such person shall be ever debarred from deriving any benefit from the same; that the act then proceeded to direct the mode in which such creditors were to proceed, at their option, either by claim

claim before the commissioners, to the end that the legislature might direct, with respect to such creditors, what to justice should appertain, or by action at law; in which case, the sum recovered by verdict, was to be paid by a certificate to be issued by the governor or commander in chief; which certificate was to be taken in payment for any purchase made at the sales of the confiscated estates; that by other acts of the said State of Georgia, and of the General Congress, the said Sir *James Wright* was rendered incapable of suing any person in Georgia, or any other of the United States: that, under the acts of confiscation, the American Government of the State of Georgia, seized and took possession of all the effects of Sir *James Wright*, to the amount of £80,000, which were sold for the use of the State; that some time before the month of June, 1782, the said *Miles Brewton* made his will, and thereby appointed *Charles Pinkney* and others executors; that the said *Charles Pinkney* soon afterwards died, having made a will, and thereby appointed his son *Charles Pinkney*, of South Carolina, and a member of the American Congress, and others, executors; that the said *Miles Brewton*, in his life-time, or his executors after his death, not having (as was alledged) got any satisfaction under the first mentioned act of assembly, for the said promissory note of £8,802. 5s. out of the estate and effects of Sir *James Wright*, confiscated under that act, the said *Charles Pinkney* the son, as personal representative of *Miles Brewton*, made a claim of the said sum of £8,802. 5s. with interest, under the authority of the last mentioned act, against the estate and effects of Sir *James Wright*, confiscated thereby, and procured himself to be admitted creditor for the same; that the defendant *Joseph Nutt* acted as attorney for the said *Charles Pinkney*, under a power of attorney for that purpose, and afterwards obtained letters of administration from the Prerogative Court of *Canterbury*, of the goods and chattels of *Miles Brewton*, limited until his original will should be brought in; and in that character commenced an action at law against Sir *James Wright*, upon the said promissory note, and got judgment in such action by default, and proceeded to execute a writ of enquiry of damages, but before the said *Joseph Nutt* entered up final judgment in the said action, that is to say, on the 19th day of November, 1785, Sir *James Wright* died, having made his will, and appointed the plaintiffs executors thereof; that thereupon the said *Joseph Nutt* proceeded to revive the said action against the plaintiffs by *scire facies*, to which the plaintiffs pleaded, and the said *Joseph Nutt* replied, and issue was taken thereupon; the cause was tried on the 4th day of July, 1786, and that the said *Joseph Nutt* recovered a verdict against the plaintiffs. The bill then proceeded to charge several facts, to shew that if *Miles Brewton*, or the said *Charles Pinkney*, had not obtained satisfaction for the said debt, out of the confiscated effects of Sir *James Wright* in Georgia, it was by their wilful default that they

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*they had not obtained such satisfaction: and the said Charles Pinkney ought to resort to that fund, more especially as Sir James Wright in his life-time, was, and the plaintiffs since his death were, totally unable to recover any of such confiscated effects; the bill therefore prayed, that the defendants Joseph Nutt and Charles Pinkney might deliver up the said promissory note to be cancelled, or discharge the plaintiffs from payment of the contents thereof, as not being liable in equity, under the circumstances of this case, to the payment thereof; but in case the Court should be of opinion, that the plaintiffs were still liable in equity, to the payment of any part of the contents of such note, then, that it might be decreed, that the said defendants, or the said defendant Charles Pinkney, ought, in the first place to seek satisfaction for the contents of the said note, out of the confiscated estates and effects of the said Sir James Wright; and that the plaintiffs might answer only so much thereof, as could not then be, or could not before have been obtained, out of such confiscated estates and effects, and that an account might be taken for that purpose, and the note be delivered up upon payment of what should appear coming on that account, and that an injunction might issue in the mean time."*

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To this bill, the defendant *Joseph Nutt* put in his answer; thereby admitted the several acts of assembly, and proceedings towards the confiscation of the estates and effects of *Sir James Wright*, in *Georgia*, and then stated, that the said *Charley Pinkney* the younger, claiming to be the personal representative of the said *Miles Brewton*, made a claim of the said sum of £8,802. 5s. *South Carolina* currency, with interest, under the authority of the last mentioned act of assembly, against the estates and effects of *Sir James Wright*, which were seized and confiscated under the authority of the said act, but that he did not, as was believed, procure himself to be admitted a creditor of the said *Sir James Wright*, or upon his said estate and effects, or obtained any order for the payment of the said £8,802. 5s. currency, or had obtained any satisfaction whatsoever for the same, or any part thereof; but, on the contrary, that such claim of the said *Charles Pinkney* was rejected by the commissioners of claims against confiscated estates, and that the commissioners entered minutes of their refusing such claim in their books, in the following words: " At a board of  
 " commissioners of claims against the confiscated estates, held at  
 " *Savannah*, in the State of *Georgia*, on the 19th day of *De-*  
 " *cember*, 1713, present the Honourable Brigadier General  
 " *Mackintosh*, president; the board having taken into their  
 " consideration an account preferred by *Charles Pinkney*, Esq.  
 " one of the executors of *Miles Brewton*, Esq. deceased, by  
 " his attorney *James Mossman*, against the estates of *Sir*  
 " *James Wright*, for £13,200, *South Carolina* currency, and  
 " also an account against the estates of *John Graham*, &c. are  
 " of



“ of opinion, that as the late *Charles Pinkney* became a *British* subject, and resided with them above two years, while the *British* courts and laws were open in this State, the accounts due some years before the revolution, and the persons against whom they are brought, able to pay them, those accounts appear in their consequence of too important a nature for this board to determine upon, and therefore they must refer them to the legislature, and especially, as it appears the delay can be no injury to the claimant, who acknowledges he may not be sufficiently informed yet of the true state of some of the accounts, and therefore this board cannot think themselves at liberty to make any provision for the same.” He admitted, that he and *Robert Norris*, of *London*, were the joint and several attornies of the said *Charles Pinkney*, and that they acted for him under a power of attorney, dated the 26th day of *May*, 1784, whereby the said *Charles Pinkney* constituted the defendant, and the said *Robert Norris*, his attornies, jointly and severally for him, and in his name, and to and for the proper use and benefit of the said *Miles Brewton*’s estates, to sue for and recover from the said *Sir James Wright*, all such sum and sums of money as were due and owing from him to the estate of the said *Miles Brewton*: that he had obtained such letters of administration of the goods and credits of the said *Miles Brewton*, as in the said bill mentioned, but that he had obtained the same, as being necessary to enable him to recover the said demand against the said *Sir James Wright*, for the benefit of the estate of the said *Miles Brewton*, and apply the money made payable thereby, in discharge of a debt due from such estates of the said *Miles Brewton*, to him the defendant; and that when the said *Charles Pinkney* remitted the said promissory note to the defendant, he directed the defendant to obtain payment thereof from *Sir James Wright*, and to retain thereout, in respect of the debt due from the estate of the said *Miles Brewton* to the defendant, the sum of £1,400 sterling; that in *October*, 1784, he applied to *Sir James Wright* for payment of the money due on the said note, amounting to £13,263. 2s. 9d. currency, or £1,894. 14s. 8d. sterling, that in the course of three following months, he had several conferences with the said *Sir James Wright* on the subject of the said demand, who did not deny the same to be justly due, but requested to have time to advise with his friends on the subject of the said debt, concerning which he informed the defendant, he intended to apply to parliament for relief, and that the defendant accordingly indulged *Sir James Wright* with time, until the 9th of *January*, 1785, when the defendant received a letter from *Sir James Wright* of that date, wherein he informed the defendant, that after having maturely considered the subject, he had resolved on applying to parliament, and if the defendant thought proper, he might commence an action against him for the recovery of the same: that the defendant, as administrator of *Brewton*, accordingly commenced an action against *Sir James*

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James Wright in *April*, 1785, to which, in *June* following, *Sir James Wright* pleaded a sham plea, but in the month of *November*, 1785, the defendant obtained judgment in the action for £1,982. 6s. 2d. sterling; that then *Sir James Wright* died; and proceedings being commenced to revive the judgment against the plaintiffs as his executors, to which they pleaded; the cause came on to be tried, and the defendant recovered a verdict, and judgment was entered on the 19th day of *July*, 1786, that then the plaintiffs brought a writ of error, which was ordered to be non-prossed, it appearing that on the defendants agreeing not to proceed by original in the action against *Sir James Wright*, his attorney had undertaken to bring no writ of error; after which the defendant applied to the plaintiffs, to know whether they would pay the debt; and on their refusal, commenced an action on the said judgment, which action was still depending. He admitted, that the confiscated property of *Sir James Wright* had been sold, and that by the act of the assembly of *Georgia*, directions had been given for applying the produce, in the first place, in payment of such debts as should be proved against such effects, to the satisfaction of the commissioners; but he did not know of any steps taken towards proving this particular debt, subsequent to the before mentioned entry of the board of commissioners. He admitted, that *Charles Pinkney* was a member of the *American Congress*, but insisted that he ought, notwithstanding, to be at liberty to resort to the plaintiffs, as executors of *Sir James Wright*, for payment of the debt, *more especially as Sir James Wright in his life-time, received considerable sums of money from the British government, in part satisfaction for the loss which he sustained by the confiscation of his property in America.*

After the coming in of this answer, a motion was made, 23d *January*, 1788, for an injunction, which, after a long argument (which is reported in 1 H. Bl. 136,) was granted.

Afterwards the defendant *Pinkney* put in an answer, in which he stated his application to the commissioners, and the minutes of the board, as the same appears in the answer of the defendant *Nutt*, and that he considered the same as a total rejection of his claim upon *Sir James Wright's* estates, although the commissioners did not think proper to declare the same; for which reason he did not make any application to the legislature, he being well assured and convinced, that such application would not have been attended with any success, and that upon enquiry of the best informed officers of the government, he had received assurances, that no provision would ever be made for his claim, and that, upon such claims as had been admitted on the confiscated estates, no equivalent payment ever had been, or probably ever would be made, from the dissipated state of their funds; and that the defendant had made application to the auditor for claims against confiscated estates in the said state, who sent him a certificate of the said minutes,

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, and also another certificate, by which he certified, that never settled the above mentioned, or any other claim of *Brewton's* executors, against *Sir James Wright's* estate, and that no provision had been made by the legislature for settling the same, and for the reasons assigned by the commissioners, as stated, no provision can or will be made for it by the State of *Georgia*; and the defendant further said, that it was always out of the power of the representative of the said *Miles Brewton* to demand payment of the said note from the State of *Georgia*. He said that his father was a member of the provincial congress, in opposition to the government of *Great Britain*, and in several offices as an officer in the *American* government, and was openly and avowedly in opposition to the *British* government. He further said that his father and himself, as citizens of *Carolina*, or South Carolina, as a member of Congress, could not avail themselves of the fund provided by the State of *Georgia*, for payment of the demand, any more than the subjects of any other State in alliance with *Georgia*, the States being perfectly distinct, and that he had used all methods in his power to no effect. The other answers stated in this answer were much the same with those in the answer of the defendant *Nutt*. This answer was not replied

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Attorney-General, Mr. *Hardinge*, Mr. *Graham*, and Mr. *Richards*, for the plaintiffs. The equity of this case is, that *Sir James Wright* has had all his property in *Georgia* confiscated, and himself a banished man, and that the fund to which the plaintiffs should resort, is that confiscated property in the hands of the State of *Georgia*.

In order to enable the executors of *Brewton* to sue *Sir James Wright* personally, they should shew that they have exhausted every method in their power to recover against his estate. Upon application of *Pinkney* to the commissioners, they refused the same, as the executor *Charles Pinkney* the elder, had become an alien subject; but this determination was not absolute, that he could not ultimately to recover; they only referred him to the legislature, to which he never applied, because he says it would have proved useless if he had; but he did not avail himself of the method he had in his power. He could have gone to a committee and obtained a certificate, and if he takes on himself to sue without taking these steps, he cannot come upon *Sir James Wright* personally; and his executors have a right to have the injunction maintained. The equity of the case is very simple, that the person who has access to a fund for the payment of his debt, to which the debtor has not access, shall make it available before he comes to sue the debtor personally. It is against natural justice in the law, or to say, you shall lose your pledge, and you shall pay me the money, because I will not have recourse to the pledge. And natural

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natural justice also requires that the proof shall rest upon the creditor, because none but he can know whether he has applied to the proper fund or not. The confiscation act pointed out the methods in which creditors were to proceed against the confiscated estates, and by omitting to follow which, the creditor loses his remedy. When the commissioners refused redress, *Pinkney* should have applied to the legislature; if they did not relieve him, he should have brought an action against the commissioners. Not having pursued those measures, he cannot sue here. It comes on precisely upon the same ground it did before, and upon which your Lordship ordered the injunction. In *Foliot v. Ogden*, 1 H. Bl. 123, they were both loyalists; Lord *Loughborough* there approved of what your Lordship had done in the former stage of this cause, and agreed, that where the first fund is fraudulently not resorted to, that would be a good ground of equity. In this case, there is no doubt recourse might have been had to the first fund. *Charles Pinkney* is a leading man in the assembly; and his not obtaining a remedy was a collusion with the state.—With respect to precedents; the peculiarity of this case takes it out of precedents. It was compared to the case of *Houlditch v. Mist*, 1 P. W. 695, but that case does not apply. In *Arnold v. Holker*, in the Exchequer, it appeared that *Holker* had obtained a certificate; a great part of the argument turned on his having used due diligence, and he was ordered in the first place to make his certificate available. It is not an easy thing to compare this to any other case. It does not resemble the case of bankruptcy or insolvency, because there the party is discharged; but suppose a party to die indebted by mortgage and simple contract, the Court, on behalf of the simple contract creditors, might compel the mortgagee to abide by his mortgage, if sufficient. It is said, that where a man has two securities, he may avail himself of either; but in the ordinary case, where that is true, the debtor is master of all the funds, and therefore there is no justice in his telling the creditor that he shall abide by one of them. Here Sir *James Wright* was no longer master of the fund in *Georgia*, and the debtor not being master of both funds, *Pinkney* may be paid out of that fund; and it would be impossible to recover back any thing he may have been paid.

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Mr. Solicitor-General, Mr. Mansfield, Mr. Stanley, and Mr. Steele, for the defendants.—The bill admits, by its principle, that there is no ground at law to say that the debt is destroyed; then there must be some ground of equity upon which they call upon this Court to dissolve the debt, and this is, that by the confiscation acts in *America*, Sir *James Wright's* property is confiscated, liable to his debts due to good and faithful citizens of the State, such of whom as had claims were to bring actions within twelve months, and that the acts contain certain methods of proceeding, but except the

the claims of persons unfriendly to *American* freedom. And the bill states, that the creditor *Pinkney* was well affected to *America*, and that defendant *Nutt* was a limited administrator and creditor of *Pinkney*.

The question is, whether, supposing them to be well affected to *America*, they were bound to apply to the state of *Georgia* for a proportion of this property. We do not admit that *Brewton* was himself such a creditor as could apply to the state; and if he could not, it was not likely his executors should. What they maintain is, that the character of the defendants obliged them to resort to the State; and that Sir *James Wright*, though able to pay a creditor, who treated with him on the ground of a personal contract, has a right to compel him to resort to that fund, and to reduce him to the delay necessary to bring that fund to effect.

If this equity can be maintained, it must be so, though no more had been confiscated than was sufficient to discharge the debt, and if that fund was ten pounds less than the debt, that the creditor has paid the debt *minus* ten pounds, and that too where the creditor treated for a personal contract.

There are no cases in this Court, except those in which diligence is by their nature required, in which the creditor has been answerable for neglect. If he takes a bill of exchange, he must, from the nature of the instrument, use diligence, but if he takes a mortgage, the Court has never called upon him for diligence, but he may, notwithstanding any neglect on his part, sue at law, returning the securities.

The case in *Peere Williams (Houlditch v. Mist)* appears to apply to this case, the *Lord Chancellor* there thought the creditor ought not to be restrained from proceeding. What is the case of a bankrupt? The law never supposes, that because a man's property is taken away from him, he is discharged from paying his debts; notwithstanding that you may sue him; the certificate would be no discharge, but that an act of Parliament has said it shall. What is the case of a person attainted? He may be taken in execution, yet he can have no property; and the reason is, because a man undertakes in all cases to pay. There is no case where a surety has endeavoured to compel the creditor to sue the principal. We deny that in this case there is a fund that can be made available to pay this demand, they should have proved that the fund is larger than the debt. The injunction in this case went on the ground that *Pinkney's* answer was not come in. *Arnold v. Holker* went no further than this: that *Holker* having property of the debtor in his hands, it should be seen what could be made of it, and that *Arnold* should pay the rest, and costs. As to not being able to put the fund in Sir *James Wright's* possession; it is sufficient that the contract was for prompt payment, no change in Sir *James Wright's* circumstances can make any difference.

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Sir *James Wright's* executors having sufficient assets to pay this demand, they might as well refuse payment on any other ground as that they set up. Suppose the case such, that if Sir *James Wright* was sent to jail, it would be total ruin to him; the Court could not, on that ground, restrain the creditor. Here was no agreement to take the remedy out of any specific part of the property. Supposing these persons were not such as could apply to the State of *Georgia*, or had not opportunity, what would be the case then? And in fact, *Brewton*, though at first he was an enemy to the taxation of *America*, was really a friend to this country, and was coming hither to settle, with his family, but they were lost at sea. This is an attempt to compel his executors to apply to the State of *Georgia* to take this sum under such terms as they shall choose to impose. Mr. *Hardinge* said, that the confiscation act required the creditor to apply to the State for this debt, but there is no such term as *require* in the act. If this be so, the case wants some contract at law, by which the creditor is to be deprived of his right of suing in such way as he thinks proper. What are the acts of confiscation, as to Sir *James Wright*? Acts of injustice, depriving a debtor of his property; but that still cannot affect the right of creditors. The fund provided in *America* is called a pledge, if it be considered so, it is decisive for the defendants: there is no case where a creditor, having a pledge, is bound to make the most of it, before he can proceed personally against the debtor, unless he is bound to do so by contract, or by the nature of the pledge. We know very little of this pledge, but that the certificates are to be paid at seven years' distance. Therefore, according to this argument, nothing is to be paid on this demand till the expiration of seven years. The equity in this case, if admitted, would be very uncertain, as it might depend on the compensation Sir *James* received from this country; for if his losses were compensated, ought he not to pay his debts arising from personal contracts? If there had been any ground to contend that the fund in *America* was the primary fund in this case, it might have been used as a defence at law. The question which was the primary fund was a question at law. In the case of *Kempe v. Antill*, (ante, vol. ii. p. 11,) an injunction was refused to stay an action on a bond, on the ground that the debtor's estate was confiscated in *America*.

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Mr. *Attorney-General*, in reply.—It is contended that *Brewton*, the original creditor, had not an opportunity of applying under the Confiscation Acts, and that *Pinkney* was in the same predicament, not being friendly to *America*. As to the first, we have it in proof, that *Brewton* was a member of the first congress; and both *Pinkney* and his son, the present defendant, were friendly and took part with *America*. It is contended, that the original contract was a mere personal contract of Sir *James Wright*. But in a variety of
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of cases, it happens that circumstances vary the nature of contracts. The natives were the only persons who could have benefit under the Confiscation Acts, no foreigners could have any benefit, especially Sir *James Wright*, who was banished; the confiscated estate therefore, partakes of the nature of a pledge, in the power of the creditor; and if a man has a pledge and does not mean to avail himself of it, he must give it up; if it happens that he cannot give it up, he is in the situation of a person who wishes to avail himself of both remedies. Here *Pinkney* did avail himself of these effects. It is objected, there was no requisition to *Pinkney* to avail himself of the pledge; but that is done away by his having in fact betaken himself to it, and only having deserted it from the fear that it would not be available. It is objected, that there is no principle, that if a man has lost all his property in one country, that he shall not be pursued on a transitive contract in another country; or that his being deprived of property should be no reason for his not being liable to his contracts; but our own acts of parliament as to bankrupts shew this has been thought to be consistent with natural justice. So, in the case of attainder, if the act of attainder provided for the payment of the debts of the person attainted, it would be a parallel case; and, in that case, I should contend that the creditor must first apply under the act before he could personally sue the debtor. In the present case, there was property sufficient in *America* to pay the debt. We do not charge the defendant *Pinkney* with any collusion with the State of *Georgia*; but object, that he did not follow up his application there, as he ought to have done before he could come personally on Sir *James Wright*.

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Lord Chancellor said, he was still of the same opinion as he was before as to the equity in general; for if a creditor here had a fund in a public treasure, provided for payment of his debt, and would, notwithstanding, pursue the debtor personally, it would be the most unconscientious case possible.

If the defendant, by any unfair pleading, had misled them, it would be different; but here he has stated his application to the State of *Georgia* fairly, and its failure of success; and wherever a party throws himself on the defendant's answer, by not replying to it, he must take whatever the defendant swears to be true:

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But, as he really thought the application made, even now, might be available, he ordered the cause to stand over, to make an application to the State of *Georgia* (a) (b).

(a) The entry in the Register's book merely states that the cause was ordered to stand over: afterwards the *Lord Chancellor* ordered the money to be paid to *Nutt*, upon giving security to repay it in case the decree should be against him, 6 Ves. 719. *Lord Eldon* has ob-

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served upon that, that *Lord Thurlow* thereby carried the principle further than his own doctrine would require, 6 Ves. 731.

(b) The other cases reported respecting *American* loyalists sued in this country by *American* creditors, are

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are *Kempe v. Antill*, ante, vol. ii. 11. *Wright v. Nutt*, (the present cause, upon the motion for an injunction) 1 H. Bla. 156. *Peters v. Erving*, ante, 52. *Folliot v. Ogden*, 1 H. Bla. 123. and in error, 3 T. R. 726. and afterwards in the House of Lords, 4 Bro. P. C. Ed. Toml. 111. *Dudley v. Folliott*, ib. 584. and *Wright v. Simpson*, 6 Ves. 714.

In several of the above cases, Lord Thurlow, Lord Kenyon, and Lord Loughborough, (the last extra judicially) expressed a decided opinion in favour of the relief prayed by the bill, upon the principle that if a case were made by which it appears that there is in the hands of the creditors, either possession of the estate in fact, or the clear means of effecting that possession, he ought to be called on so to do, or at least the Court should interpose; the creditor not having the power of assigning to the debtor those means which he had of affecting the property. In the last of the above cited cases, the bill was the same as in the present, and it was also against creditors of Sir J. Wright: it was dismissed upon the circumstances, as it did not appear that the creditor had the clear means of making his demand effectual against the fund arising from the confiscation. But Lord Eldon at the same time, in one of the most luminous and convinc-

ing judgments extant, expressed his dissent from the principles of the former opinions; his Lordship thought, that as it could not be contended, that under such circumstances the personal liability of the debtor is taken away, so it could not be law, that under such circumstances the remedies resulting out of that liability should be restrained by confining the remedies to particular funds, or by confining them altogether as to the person, till the creditor has had recourse, not to all the funds of the debtor, but to some of his funds, which funds in the original constitution of the debt, and the transaction forming the relation of debtor and creditor, the debtor did not propose, nor the creditor receive, as the funds to be charged by the contract. That considering it as a pledge, if the effect of the contract was, that he should have all the remedies belonging to the nature of a pledge, and also personal responsibility, it was questionable whether the revolution would have operated to drive the creditor to the pledge, and to compel him to give up the other remedy at the instance of the debtor; but that the difficulty was much enhanced, when the pledge is not given to the creditors by the contract, but thrown to him by an act not his own.

Lincoln's-Inn
Hall, 3d August.

PYBUS v. SMITH (a).

A feme covert having a settlement of a real estate, and money in the funds, the rents and dividends to be paid as she should from time to time direct, with a contingent remainder, in failure of issue to herself, conveys the whole jointly with her husband, as a security for the husband's debts, the conveyance must be carried into execution by a court of equity.

BY lease and release, dated 5th and 6th May, 1785, being a settlement subsequent to the marriage of the defendant *Thomas Vernon* with *Anna-Maria* his wife, the said *Thomas* and *Anna-Maria*, in pursuance of a decree of the Court of Chancery, released to the defendants *Smith* and *Leader* a messuage in *Garland Alley, Bishopsgate Street*, in trust to permit said *Anna-Maria*, to receive, or otherwise during the life of said *Anna-Maria*, to pay, apply, and dispose of the rents and profits unto such person or persons, in such shares and proportions, manner, and form, and to and for such uses and purposes, as she, the said *Anna-Maria Vernon* should, by any writing or writings under her proper hand, from time to time, direct or appoint; and in default of such direction, then into the proper hands of the said *Anna-Maria*, and for her sole and separate use; and after the decease of the said *Anna-*

(a) Reg. Lib. B. 1790. fol. 683.

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Maria, then upon trust for such person, for *such estate and estates*, in such shares and proportions, and for such uses, and chargeable with such sums, and subject to such powers, provisions, declarations, limitations, and agreements, and in such manner and form, as the said *Anna-Maria Vernon*, whether covert or sole, by any deed or instrument in writing, with or without power of revocation, to be by her only executed, under her hand and seal, in the presence of two or more credible witnesses, should direct, limit, or appoint; and in default thereof, and as to such part whereof there should be no appointment, in trust for the said *Anna-Maria Vernon*, her heirs and assigns for ever. And it was by the said indenture witnessed, that the said trustees should stand possessed of £2,531 four per cent. Bank annuities, mentioned in the said decree, during the life of the said *Anna-Maria Vernon*, to pay and apply the dividends unto such persons, and in such shares and proportions, manner and form, and to and for such uses, intents, and purposes, as the said *Anna-Maria Vernon* should, by any writing or writings under her hand, direct and appoint; and in default thereof, to pay the same into the hands of the said *Anna-Maria Vernon*, for her sole and separate use; and after the decease of the said *Anna-Maria Vernon*, to sell the same, and pay and apply the money arising therefrom to and amongst all and every the child and children of the said *Anna-Maria* by the said *Thomas*; and in case there should be no child, or all of them should die under twenty-one, unmarried, then to such uses as said *Anna-Maria Vernon* should by any deed or instrument in writing, under her hand and seal, executed in the presence of, and attested by two or more credible witnesses, direct or appoint; and in default thereof, for the executors and administrators of said *Anna-Maria Vernon*.

The defendant *Thomas Vernon*, was a trader, and dealt with the plaintiffs, who were bankers, in the way of their trade, and applied to them to accept and pay such drafts as he should draw upon them, or make payable at their house, which they consented to; but into 1785, being considerably in advance on his account, they required him to give them security, which he proposed to do upon this separate property of the wife's; and by indenture, dated 15th August, 1785, made between the said defendant *Thomas Vernon* of the first part, the defendant *Anna-Maria Vernon* of the second part, and the plaintiffs of the third part, reciting the settlement of the 5th May preceding, it was witnessed, and *Thomas Vernon* thereby covenanted to supply plaintiffs, their executors and administrators, with cash sufficient to pay and discharge all drafts or bills drawn or made payable by him at their banking-house, or which should become due or payable; and defendant *Anna-Maria Vernon* did, by virtue and in pursuance of her power, direct and appoint that the rents and profits then due, or to become due, in respect of the premises, should, during her life, be paid by the trustees to the plaintiffs; and from and after her decease

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the trustees should stand seised thereof to the use of plaintiffs; and she also directed and appointed, that the interest and dividends then due, or to become due, of all the £2,531 four *per cents.* should be paid by the trustees to plaintiffs, and immediately after her decease without issue, should belong to, and the trustees should be possessed thereof, for the use of the plaintiffs, upon trust, in case default should be made by the said *Thomas Vernon* in payment to plaintiffs, their executors or administrators, of any of the sum or sums of money so to be advanced by them to said *Thomas Vernon*; that it should be lawful to plaintiffs, &c. to sell the reversion in the real estate, and the contingent interest in the money in the funds, or to raise and take up by mortgage thereof so much money as, with the rents and dividends, should be necessary for paying the costs they should be put to, and for reimbursing them all sums in which the said *Thomas Vernon* should be indebted to them on account of money so advanced, and interest thereon; and if there should be any surplus, to pay the same to her; and the deed contained a power of attorney from the trustees to plaintiffs to receive the rents and dividends, and a covenant from plaintiffs, in case they were kept indemnified, to re-convey.

By deed-poll, dated 16th *August*, 1785, under the hand and seal of *Anna-Maria Vernon*, she, in consideration of the marriage, and of love and affection, and by virtue of her power, directed the trustees to pay the rents, and, after her decease, to stand seised of the real estate to the use of her husband, in fee; and also to pay to him the dividends of the money in the funds; and after her decease, without issue, to stand possessed of the principal in trust for him absolutely.

In *November* 1786, the plaintiffs having discovered this deed-poll, and having observed, that though the deed of appointment extended to an indemnity against money paid upon drafts, or bills drawn upon, or made payable at their house, by defendant *Vernon*, that it did not extend to money paid for discount of bills or promissory notes for the accommodation of the defendant *Thomas*, applied to him for a further security against such monies advanced by way of discount, and by indentures of lease and release, dated 6th and 7th *December*, 1786, the estate and monies in the funds were made a security for sums so advanced, or to be advanced.

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The plaintiffs afterwards discounted several notes and bills of exchange for defendant *Thomas*, and were £1,500 in advance on his account, when, in 1788, a commission of bankruptcy was issued against him; upon which they applied to the trustees to pay the rents and dividends to them, and to join them in the sale of the reversionary and contingent interest of defendant *Anna-Maria* in the real estate, and money in the funds, in order to their indemnification; and, upon their refusal, filed the present bill, the prayer of which was, that the defendant should pay such rents and dividends, and join in such sale.

Mrs.

Mrs. *Vernon*, in her answer, submitted that the rents and profits of the real estate, and the dividends upon the money in the funds, ought to be paid into her own hands, for her separate use, and that they were not liable to the debts or engagements of her husband; and said, that she did not conceive, at the time of executing the deed, that she was conveying her life estate and interest, but only the reversion in case of her death without issue; and therefore hoped that the trustees would be decreed to pay the same to her.

The cause came on to be heard in *Trinity* Term 1790, when it was referred to the Master to report under what circumstances the deed was executed; and the Master was to examine the parties on interrogatories.

The Master reported, that, upon examination of witnesses examined before him on interrogatories, it appeared that the deeds were executed by the defendants *Thomas* and *Anna-Maria Vernon* freely and readily, and that no arguments or persuasions were used, at the time of executing the said deeds by any person, to induce them to execute the same; but that the witnesses did not recollect that the deeds were read, or the purport thereof explained to the defendant *Anna-Maria*; but one of the witnesses, (who prepared the deed) said, that it was his constant practice to read, or explain, to all parties executing deeds prepared by him, and particularly to married women, the nature and contents of such deeds; and therefore *he was induced to believe* that the deeds so executed were read, or the purport thereof explained to the defendants, and understood by them, previous to the execution of them: and that the plaintiffs, upon their examination, stated that the security was executed upon the proposal of *Thomas Vernon*, that they had no concern in the preparation, and that they did not know of the preparation thereof until after the execution; but they believed the defendant *Anna-Maria* knew that she subjected not only the contingent reversion of her property, but also the income during her life, to the payment of the money which was, or should become due, from her husband to the plaintiffs; and that no attempt was made, or endeavour used to make her believe that she was only charging her reversionary interest with the same, and said that they did not advance any money to the defendant *Anna-Maria* for joining in the deeds.

The cause came on now upon the Master's report;—Mr. *Solicitor-General*, for the plaintiffs, stated the facts, and argued that a *feme covert* was, as to her separate property, exactly in the same state as a *feme sole*; and that the payments, in this case, being to be made to her *from time to time*, could make no difference.

Mr. *Lloyd* and Mr. *Nedham*, for the defendants, said the present case involved two questions; 1st. Whether the Court will give its assistance to carry the voluntary agreement into execution, even where the woman has received the money, and the transaction is perfectly

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perfectly fair. 2d. Whether this is a case in which the Court will lend such assistance. It is certainly in the power of a parent to give a daughter, who is married, a provision which shall be payable from month to month, or at other periods, without giving her a power to assign it over at once. Here the legal estate is in the trustees, to receive the rents and interests, and to pay them to Mrs. *Vernon*, or to permit her to receive them, which is the same thing; for though to permit a man to receive rents and profits would, at law, be a good use, here the use would be executed in the trustees. The title of the plaintiffs is equitable and voluntary, and with full notice that she was a married woman; and the bill states, that, previous to the transaction, the plaintiffs had trusted *Vernon* as far as they dared.

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Mrs. *Vernon* was an infant, and a ward of this Court, when *Vernon* carried her off to *Scotland*. It was agreed between him and her friends, that he should have part of her fortune, upon settling the rest upon her and her children. Upon this, he made a proposal, by which, had it been carried into execution, she could not have appointed it in this way. When your Lordship referred it to the Master he disapproved it, and the present settlement was afterwards made. There are many cases where the husband's proposal has been considered as the agreement. In such a case, your Lordship will never permit the trustees to be converted from trustees for her to trustees for the plaintiffs.

The trusts are, that they shall permit and suffer her to take the rents *from time to time*; the proposals were, that they should pay them into her own hands; she was a married woman, and the Court intended it should be a provision from quarter to quarter, as the rents and interest were paid. It was intended as a maintenance, but the Court could not intend that she should, by one stroke, put an end to her future subsistence, but only that she should appoint the dividends as they became due.

If this is not so, it would be of no use to put in trustees into these settlements. Here the defendant has disposed of her provision without their intervention, and swears that she was not informed the conveyance extended further than her reversionary interest.

In *Allen v. Papworth*, 1 Ves. 163. where it was held the wife might appoint her separate property for the husband's debts, she had the whole property, it was not intended as a maintenance. The inference from *Grigby v. Cox*, S. B. 518. is, that if the words there had been, as they are in this, "to pay from time to time," the wife could not have conveyed it away. In *Machorro v. Stonehouse*, cited in *Hulme v. Tenant*, (ante, vol. i. p. 18.) the purchaser's bill was dismissed; that case is well worth considering, for Sir Thomas Settle was in great business at the time the cases on the subject were determined, and must have known what was done.

In

In this case, the agreement being different from the first proposal, the children would be entitled to have the settlement varied.

As to the propriety of carrying the agreement into execution, it is merely an equitable agreement, and the plaintiffs are applying to change the terms of it. If the agreement is an improper one the Court will not carry it into execution; it was executed either in great distress, or under the controul of her husband, and the deeds were prepared from the instructions of the husband alone; by her answer it does not appear she knew what was done; the plaintiffs knew she was to receive no compensation for it.

If the wife conveys her separate property to the husband himself, without doubt that will not avail; yet there is no positive law that such a conveyance shall be set aside.

If they were failing in their circumstances, that would be a sufficient ground to set the transaction aside.

Lord Chancellor said, if the point was open, he should have thought that a *feme covert* who had a separate estate should not part with it without an examination; but a *feme covert* had been considered by the Court, with respect to her separate property, as a *feme sole*; therefore, though he had been desirous of going as far as he could, he found he had gone too far upon a former occasion*. If a *feme covert* sees what she is about the Court allows of her alienation of her separate property.

If

* His Lordship referred to a case of *Ellis v. Atkinson*, which came on in Easter and Trinity 1789, where the limitations in the settlement were, that the trustees should pay the interest of £2,000 in the funds into the plaintiff Susannah's own hands, or to such person or persons as she, notwithstanding her coverture, should, by writing under hand, from time to time appoint, to the intent that the same should be for her sole, separate, and peculiar use, and might not be subject to the debts, &c. of the husband. The husband and wife filed the bill, praying that the trustees might assign the property to the husband. It stood, as a short cause, for the last day but one of Easter term, and the wife attended in Court to consent: Lord Chancellor doubted very much whether he could take her consent, but took it *de bene esse*, and desired the point might be considered the next term, when it was argued much at large by Mr. Solicitor-General, and Mr. Hollist for the plaintiffs, who cited the case of *Clarke v. Pistor*, and *Newman v. Cartony*, which shall be stated below. Lord Chancellor took time to consider; but the parties coming to a compromise, no judgment was ever pronounced (a).

Clarke v. Pistor, Rolls, 25th March, 1777. By settlement, 8th February, 1776, Bank stock was covenanted to be, and was transferred to trustees, in trust to pay the interest and dividends to such persons, &c. as plaintiff Margaret should, from time to time, during her life, notwithstanding her coverture, by any note or writing under her hand, direct or appoint, and in default of appointment, into the proper hands of plaintiff Margaret, for her separate use; and after her death to transfer the stock to plaintiff the husband, absolutely.

(a) It is most extraordinary that this mistake should have been permitted to stand in three editions of this work; the case itself, and the decree, (which was one of the many that Lord Thur-

low sent down to the Register on the 24th of May, 1792), being reported in this very volume, post, 565. It has more than once been the cause of mistakes.

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If it was the intention of a parent to give a provision to a child in such a way that she cannot alienate it, he saw no objection to its being done; but such intention must be expressed in clear terms.

It was referred to the Master to inquire whether the plaintiffs had any other security (a).

On a bill filed by the husband and wife, without appointment, and on consent of the wife, the Court directed the trustees to transfer.

Newman v. Cartony, 2d April, 1771. A legacy had been given to the wife for her sole use, with a power of appointment by will, and in default to her executors. It was ordered, on her consent, to be paid to the husband.

It was also said, in arguing *Ellis v. Atkinson*, that Lord Kenyon, when at the Rolls, had upon great consideration, in the case of Mrs. John Buller, who was entitled to separate property for life, with remainder to her children, with her consent, ordered a part to be raised for the advancement of a child. See *Sockett v. Wray*, vol. iv. p. 483, in which all the cases are fully considered by the Master of the Rolls.

(a) This case has frequently been al-
 luded to, as one in which the doctrine
 was carried, by the force of previous
 authorities, to a most alarming and in-
 convenient extent. While the Court
 was settling the property, and en-
 deavouring to protect it with all the
 anxious terms then known to convey-
 ancers, in a day or two afterwards, while
 the wax was yet warm upon the deed,
 the creditors of the husband got a
 claim upon it by an informal instru-
 ment, and the same judge, who had
 made such efforts to protect her, was,
 upon authority, obliged to withdraw
 that protection, (9 Ves. 492). These

cases suggested to Lord Thurlow, in a
 case frequently cited (*Miss Watson's*
case), where he was a trustee, the in-
 troduction of clauses in restraint of
 anticipation, in which he was followed
 by Lord Alvanley, and their validity is
 now established beyond all controver-
 sy, *Chassaing v. Parsonage*, 5 Ves. 17. n.
Jones v. Harris, 9 Ves. 494. *Parkes v.*
White, 11 Ves. 221. *Jackson v. Hob-*
house, 3 Meriv. 437. The cases con-
 nected with this subject are collected
 in the Editor's notes to *Hulme v. Tenant*,
 ante, vol. i. 16. *Duke of Bolton v. Wil-*
liams, post, vol. iv. 297. and particularly
Sockett v. Wray, ib. 483.

Lincoln's-Inn
 Hall, 3d August.

FOSTER and Others v. COOK and Others.

Testator (his
 wife being
ensient) gave
 his estate to
 trustees, to apply
 profits for the
 use of the child
 during infancy,
 and at twenty-

five to the child in fee; but in case the child should die before twenty-five without issue re-
 mainder over. The child was stillborn. After which testator made a codicil, affirming his
 will, and died without issue. Forty-three weeks after his decease the widow is brought to
 bed of a son, (who is found to be legitimate.) The son cannot take the estate, but the de-
 visees over shall take. In the will the testator gave his wife an annuity; she shall, notwith-
 standing, have her dower. He also ordered the trustees to possess themselves of his estates
 and substance, and to pay debts, this is a charge of the debts on the real estates; and the
 assets shall be marshalled for the legatees, to let them in so far as the personal estate has
 paid towards the debts.

estate,

estate, and thereby gave to the plaintiffs, (the trustees) all his real and personal estate whatsoever, upon trust to pay his wife an annuity of £50 a year during widowhood, and in case she should marry again, then to pay her an annuity of £30 only; and testator desired his trustees to permit his wife to have the use of his mansion-house, and such furniture therein as she should think proper, during her widowhood, and not otherwise; and he thereby ordered and directed, *that the child, wherewith his said wife was then pregnant*, should be nourished and brought up with his said wife until it should attain twelve years of age; and desired his trustees should improve and manage his real and personal estates, and all other his substance and effects whatsoever, in the best manner they could, for the benefit of the said child in all needful and necessary support and maintenance whatsoever, at their discretion; (and gave particular directions for the maintenance and education of the child at different ages) and the testator then disposed of his real and personal estates in the manner following: “and when my child shall arrive at its full age of twenty-five years, then I give, devise, and bequeath all my said real and personal estates whatsoever, lands, tenements, and hereditaments, with the rights, members, and appurtenances thereto belonging, for ever; but not to sell or mortgage the same; charged and chargeable, nevertheless, with the payment of the annuity bequeathed to my wife by this my will; and *in case my said child should happen to depart this life without leaving any issue*, then, and in such case only, and not otherwise, I give and devise all my said real and personal estate to my loving cousins *George Foster, John Foster, William Foster, Mary King, and Jane Marriott*, (five of the defendants) to hold to them and their heirs and assigns for ever;” and after giving to his uncle, (the plaintiff) *William Foster*, a legacy of £100 to be paid him within five years after his decease, and other pecuniary legacies, the testator declared his will to be, that the plaintiffs should, with all convenient speed after his decease, take an inventory of his effects and household goods, *and possess themselves of all his estates and substance*, and improve the same for the benefit of his said child, *and to pay all his justs debts*, and to keep an account of all payments or disbursements on account of the trusts, and to render an account to said child when thereto required, and to reimburse themselves, &c. until the child should attain the age of twenty-five years, and appointed the plaintiffs executors *in trust*, until the child should attain twenty-five, and gave them power to raise money for the child’s benefit, and gave the trustees £10 each for their trouble.

Jane Cook was, on the 28th October, 1779, delivered of the child of which she was *ensient* at the time of the testator’s making the will, but such child was stillborn.

The testator, 24th November, 1779, made a codicil to his will, by which he gave to his wife £20 and another legacy, and in case any overplus should remain in the hands of his trustees, after payment

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ment of all his just debts and legacies, out of his stock and personal estates, he ordered such overplus to be divided into two parts, and gave one moiety thereof to his wife, and the other moiety to the plaintiffs, over and above their legacies, and desired that the codicil might be annexed to and make part of his last will and testament, to all intents and purposes, and be deemed and taken as part thereof.

*Henry Cook*, the testator, died 14th *January*, 1780, without leaving any issue, and without revoking his will, which the plaintiffs proved in the Ecclesiastical Court.

*Jane Cook*, the defendant's widow, was delivered of a son, (the defendant *Henry Cook*) on the 9th day of *November*, 1780.

The testator was, at his decease, indebted by specialty and simple contract.

Different claims being set up, especially with respect to the legitimacy of the defendant, *Henry Cook*, who was born forty-three weeks, except one day, after the testator's decease, and whom the devisees over contended to be, on that account, illegitimate; and the heir at law, in case the defendant *Henry* was illegitimate, also claiming the whole; the widow also claiming dower, and a moiety of the residue of the personalty, if any; the plaintiffs, the trustees, filed the present bill, praying that the will might be established, an account of the personal estate; and in case it should be insufficient to pay funeral expences, debts, and legacies, that a sufficient sum might be raised out of the real estates to make good the deficiency; and that the rights of the persons entitled to the real and personal estates might be declared.

The defendants having, by their answer, made the claims imputed to them in the bill, the cause came on to be heard on the 4th of *July*, 1783, before the then Lords Commissioners; when an issue was directed to try the question of the legitimacy of the defendant *Henry*, by trying whether *Edward Cook* (who claimed to be heir, if *Henry* was illegitimate) was the heir at law of the testator: in which issue the said *Edward Cook* was to be plaintiff, and *Henry Cook* defendant.

The issue was tried, and by a verdict for the defendant, *Henry Cook*, his legitimacy was established.

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The cause had come on 23d *June*, 1784, upon the equity reserved, when the proper accounts were ordered, and further directions reserved.

It came on now for further directions, when three questions were made:

First, As to the claims of *Henry Cook*, and the contingent devisees over, as to the real estate;

Secondly, Whether the wife was entitled to dower as well as her annuity;

Thirdly, Whether the assets were to be so marshalled, as to let in the legatees upon the real estate.

On

On the first point—Mr. *Solicitor-General* for the infant, *Henry Cook*, contended, that he had a right to the estate. The event has not happened, in which the testator has given it over, which was upon the child of which the wife was then *ensient*, being born, and dying without issue under twenty-five years of age; the will making this provision, and the event not having happened, the testator is dead intestate, and the infant (who is found by the verdict to be his legitimate son) is entitled as heir at law. The codicil being made after the child was stillborn, could only be referable to those parts of the will which remained, therefore no disposition was made of the real estate. In the case of *Miller v. Faure*, 1 Ves. 85. though the first devise failed, the second could not take place, because the event in which it was given had not happened; and although the contingency, in this will, is not so clearly expressed as it there was, it is a contingency, in case the child come into *esse*, and die under twenty-five, without issue, upon which it is given over; and that contingency has not happened.

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Lord Chancellor said, he owned it appeared to him a desperate case for the child (a).

His Lordship also observed, that he saw no reason why the widow should not have her dower.

Mr. *Mansfield* and Mr. *Hollist* contended that, upon the case, the widow could not take both the annuity and her dower. It is an annuity of £50 for life, if she continued so long his widow; if she marries again, then only £30 a year. He could not mean she should have this and her dower. The trustees are to have possession of the whole estate, and out of it are to pay her the annuity, which is inconsistent with her having the third part as a dower. Her claim would put the trustees out of possession. This is stronger than the modern cases that have infringed upon the rule, that nothing but what is express shall deprive a woman of her dower. In *Arnold v. Kempstead* (b), Amb. 466. it was held the wife was to have no more than the annuity out of the estate. In *Villureal v. Lord Galway*, Amb. 682. it was held, that giving her dower would disappoint the will. *Jones v. Collier*, Amb. 730. is also a strong case against her taking her dower.

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With respect to the charge of debts, it is not sufficient here to make a charge upon the real estate. It is only a discretionary power to raise, out of the personalty, sufficient to pay the debts; he clearly meant only the personalty to be liable. There is no case where the real estate has been devised, that the Court has marshalled the assets.

(a) As to this, vide *Doe v. Braham*, post, 393.

(b) S. C. 2 Eden, 236.

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Lord Chancellor.—With respect to the charge for payment of debts, he directs the trustees to possess themselves of all his *estate and substance*, to pay debts; it is a most direct charge (a).

Then as to the other point, the wife has a charge upon the estate, paramount the will; she has an absolute right to the third part; it is not his to deprive her of it. But, here it is to be gathered from circumstances, that she is not to have it; and because he gives all *his* property to the trustees, I am to gather from his having given all he *has*, that he has given that which he *had not*. So far from a declaration plain, I have nothing even to lead me to think he meant to deprive her of dower. She must, therefore, have her dower (b).

And the legatees must come upon the real estate, so far forth as the personalty has been applied in payment of debts *.

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* In *Bradford v. Foley*, 14th August, 1791, *Tempest Hay*, by will dated 1762 (c), after directing all his debts and funeral expences to be paid, devised all his real estates to trustees, to the use of his son for life, remainder to his first and other sons by any future marriage, in tail male, with remainder to daughters as tenants in common, and the testator did declare, that if his said son should intermarry with any woman related to his then present wife, the uses limited, so far as the same should relate to the issue of such future marriage, should cease and determine; and the trustees should stand seised of all the premises, to the use of all and every the children of testator's brother, *John Hay*, deceased, who should be living at the time of his death, share and share alike; and in case all the children of testator's said brother should happen to die in his the said testator's life-time, or after his death, without issue, he gave and devised all his real estates unto his own right heirs, that is, such as should be no way related to *M. A.* his son's then wife: and the testator, after giving divers legacies to the persons named in the will, directed the residue of his personal estate not therein before disposed of, to be laid out in government securities, in the names of his executors, to be settled and applied to the same uses as his real estates were therein before limited to: testator died, leaving issue his son *Thomas*, and leaving several of the defendants the children of his brother *John*. By the decree, on the hearing of the cause, the will was established, and it was among other things ordered, that the personal estate of the testator should be applied in payment of his debts, funeral expences, and legacies, in a course of administration; and that, in case the testator's personal estate should not be sufficient to pay his debts, funeral expences, and legacies, his Honour declared the real estate was subjected, by the will, to the amount of debts and funeral expences; that the real estate, or a sufficient part thereof, should be sold, and the money arising from the sale, be applied in making good the deficiencies: and in case any of the creditors had received any thing out of the testator's personal estate toward satisfaction of their demands, then they were not to receive any part of the money arising from the said sale, till the other creditors were paid up equal with them.

The estate had been sold; and the personal estate not being sufficient for payment of debts and legacies, they were ordered to be paid out of the money produced by the sale of the real estate.

In *Webster v. Alsop*, Rolls, 12th July, 1791, *John Taylor*, by will, dated 2d January, 1788, directed all his just debts and funeral expences to be paid out of his personal estate; and if his personal estate should not be sufficient, he

(a) As to the words which constitute a charge of debts, vide *Butson v. Lindgreen*, ante, vol. ii. 94.

(b) For the doctrine upon this subject, vide the Editor's notes to *Arnold v. Kempstead*, 2 Eden, 236. and *Pear-*

son v. Pearson, ante, vol. i. 293.

(c) This will is stated in Dougl. 63. in a cause referred by the *Lord Chancellor*, to the B. R. between the same parties, but on quite a different point.

charged

charged his real estate with so much thereof as his personal estates would not extend to pay; and then devised his real estate to trustees, subject to annuities and other payments, to the use of the plaintiff for life, with remainders over, and gave several legacies; and the personal estate proving deficient, it was declared that the legatees were entitled to stand in the place of the creditors, for so much of the personal estate as had been exhausted by them in the payment of their debts.

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HUGHES v. HUGHES.

Lincoln's-Inn
Hall, 3d August.

THOMAS CHAMBERLAIN being seised and possessed of real and personal estates, made his will 22d July, 1779, and thereby devised his real estate, in the county of Oxford, to trustees, in trust for his grandson, *Thomas Chamberlain Hughes*, for life, with remainders over, subject to an annuity of £100 to his daughter, *Rebecca Hughes*, for life; and after giving £400, in trust, for *Elizabeth Cross* for life, and afterwards for her children, and after giving directions, touching £2,000, 3 per cent. Bank annuities, therein mentioned to have been appointed for the use of the plaintiff, *Susannah Adlam*, and her children, and directing that, in case of the death of all her children under twenty-one, and before marriage, the said £2,000 should revert to, and be part of the *residuum* of his personal estate; the testator directed that the rents and profits of his houses in *Princes-street*, &c. and the dividends of his monies in the public funds, and all other his personal estate, except the above £2,000, should be paid and applied by the trustees in manner following: unto each of his two daughters, the plaintiffs, *Susannah Adlam*, and *Devereux Kennedy*, to each for their separate use, the yearly sum of £100 during their lives, and subject thereto, to pay all the rest and residue of said last-mentioned rents, and profits, and interest, for the maintenance and education of all the children of his said three daughters, *Rebecca Hughes*, *Susannah Adlam*, and *Devereux Kennedy* (except said *Thomas Charles Hughes*, or such of his grandsons as should be in the receipt of the rents of the real estate) share and share alike, until the youngest of said grand-children should attain twenty-one; and in case of the death of any of them before the youngest should attain twenty-one, who should have been married, and should have at his or her decease a child or children, then testator directed, that such child or children should be entitled to the same share which their deceased parents would have received, in case they had respectively lived till the youngest of such child or children should have attained twenty-one; and when such youngest child should have attained twenty-one, then testator gave one full

Gift of a residue to apply rents, &c. to the maintenance of all the children of the testator's daughter, till the youngest should attain twenty-one, then the principal to be divided among them, and the children of such as should be dead. Only the children born at death of testator shall take (a).

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(a) Vide post, 435, as to the mistake in this report.

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and proportionable share of the capital thereof, to the proper use of such his said grand-children, as should be then living, and the child or children of such as should be dead.

Devereux Kennedy, at the death of the testator, had six children (who are plaintiffs); she, after his decease, had another child, the defendant, *Louisa Kennedy*; *Rebecca* had only one child, the plaintiff, *Robert Hughes*, but afterwards had issue the defendant, *Sophia Hughes*; and *Susannah Adlam* had four children, who were also plaintiffs; but, after his decease, had two other of the defendants.

The bill prayed, that the rights of the parties might be declared.

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At the hearing, the proper accounts had been directed, and further directions reserved.

It came on again now; and the question was, whether the plaintiffs, being the children of testator's three daughters born at the time of his decease, were to take exclusively of the defendants, who were born after his death, or they were all entitled.

Mr. *Mansfield* and Mr. *Hollist*, for the plaintiffs, contended—that the construction of the will could not be extended further than the children born at the decease of the testator. It has been held, upon similar words, only to include children born at the death of the testator, *Heathe v. Heathe*, 2 Atk. 121. The postponing the division till the youngest attains twenty-one, will make no difference; where there is a gift to one for life, and then to be divided among children, as was the case in *Congreve v. Congreve* (ante, vol. i. p. 530.) all will take, but not where the description is the children of such an one; it then only speaks at the death of the testator.

Mr. *Solicitor-General*, and Mr. *Mitford*, for the defendants, argued—that the devise extended to all the children; there is no doubt that in the case of Mrs. *Adlam*, who has an estate for life, all her children will take; and it cannot be contended, that he meant the will should take a different construction, with respect to her, from the other daughters. The time of the division is when the youngest shall attain twenty-one; then all born before the youngest attains twenty-one must take. If any of the children died before the youngest attain twenty-one, their children were to take their shares; but their children might be born after the decease of the testator, and it would be hard that the grand-children born after, should take, and not a child born after. The words are, all and every the children, which are sufficiently extensive to take in those born after; and more properly refers to them, than only to those living. In the gift of the capital, the word *then* evidently refers to the time of the distribution; and he meant that such grand-children as should be then living, and the children of such as were dead, should take. There is no actual gift till then.

In

In *Congreve v. Congreve*, the words were, all and every the child and children of *Thomas Congreve*, at twenty-one. That case has been often cited and determined upon. At least it will be open till the youngest child then living should attain twenty-one, when the division was to take place. We only ask it for children under that description.

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Lord Chancellor, during the argument, said—*when the gift was general*, it was always confined to the death of the testator; where there is a gift for life, or the distribution is postponed to a future time, then children born during the life, or before that time, are let in. *Congreve v. Congreve* seems a very strained determination; because when the first child attained twenty-one, the division must be made. His Lordship (1) *finally determined* in favour of the children alive at the decease of the testator.

(1) This is a mistake, vide post, 435.

SPINK and Another v. LEWIS and Others (a).

Lincoln's-Inn
Hall, 5th August.

SAMUEL JOHNSON, seised of real, and possessed of personal estate, made his will, 9th February, 1779, and thereby gave all his lands, &c. to the plaintiffs and *William Johnson*, son of his brother, *William Johnson* (since deceased), and their heirs and assigns, in trust to sell the same, and directed the money to be laid out at interest in the public funds, and thereby gave an annuity of £8 to *Mary Johnson*, and also gave to the two grandchildren of his brother, *John Johnson*, an annuity of £10, and then ordered the residue of his personal estates, and the money arising therefrom, to be vested in the public funds, and there be and remain for the space of ten years; and at the end and expiration of the said term, he willed and directed that the same, together with the interest, and accumulated interest which should have accrued thereon, should be divided into six parts, one-sixth part whereof he directed to be paid to the said *William Johnson*, the son, or to his legal representatives; and the other five parts thereof to be divided among such of his next of kin, and legal representatives, as should be then living, under the usual and due course of representation, and appointed the plaintiffs, and the said *William Johnson*, the son, joint executors of his said will.

The testator died the 17th June, 1779, leaving said *William Johnson* the elder, his only brother and next of kin, and leaving the defendant *Sarah Chapman*, his great niece and heiress at law.

Testator ordered real estate to be sold, and the residue to be laid out in the funds, to remain for ten years, and at the end thereof gave the same to his next of kin. The next of kin at the time of the death would be entitled to take; and the testator having but one brother, who was such next of kin, and who died within the ten years, it is lapsed, and so much as was produced by the real estate reverts to the heir at law of the testator, and so much as was personalty to the representatives of the brother.

(a) Reg. Lib. A, 1790. fol. 606.

The

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The executors proved the will and sold the real estates, and invested the money in the funds, and out of the interest thereof paid the annuities to the persons whom they thought entitled; with respect to which there was a question, which does not appear by the decree to have been decided.

The period of ten years, at the expiration of which the division was to be made, expired 17th *June*, 1789.

The bill prayed that the defendants might set forth what interest they respectively claimed; which they did by their answers; and at the hearing it was referred to the Master to take the proper accounts, and to report who were the testator's next of kin at the time of his decease, and at the expiration of ten years therefrom, being the time at which the division was ordered to be made.

The Master reported, among other things, that at the time of the testator's decease, *William Johnson* was the only surviving brother of the testator; and that his next of kin, the 17th *June*, 1789, were the defendants *Mary Jarrold* and *Isaac Johnson*, surviving children of *William Johnson*; and he reported that *William Johnson* the brother, died 18th *December*, 1781, leaving the defendant *Frances*, his widow, and three children, viz. said *William Johnson*, said *Isaac Johnson*, and *Mary Jarrold*, that *Frances Johnson* is the administratrix of *William Johnson*; and that *William Johnson* the son is also dead intestate, leaving the defendant *Elizabeth* now the wife of defendant *Hastings*) his widow, and one child only named *Samuel* (since deceased); and that said *Elizabeth Hastings* is the administratrix of her said late husband, and also of her son.

The cause came on now for further directions upon these questions:

1st. Whether, under this will, the next of kin, at the time of the making the will, or at the time of distribution, would take?

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2d. If the former, and that by the death of *William Johnson* the residue was become lapsed, whether there was a resulting trust for the heir, as to so much of it as was the produce of the real estate?

Mr. Solicitor-General, as to the first question, submitted—that according to the true intent of the will, in the events that have happened, those persons who would be the next of kin at the expiration of the ten years were to take. At the time of making the will, *William* his brother was his sole next of kin, which he must have known, as he mentions him in his will, but he never could mean him by the word *amongst*, which shews he had in contemplation a number, amongst whom there could be a division.

Mr.

Mr. *Mansfield* and Mr. *Abbot*, for the heir at law.—The gift of the residue must be construed to be to the next of kin at the time of the decease; it is immaterial that the testator has mistaken the number he had of nephews and nieces, whom he might probably think next of kin. In *Cro. Eliz.* 506, the Court thought the words related to the death of the party, not the time when it would come into possession; then it has lapsed, by the death of the next of kin, within the ten years; and the disposition by that means failing, so much of it as arose from real estate must result, as such, to the heir, as in the cases of *Digby v. Legard* (cited, vol. i. p. 501.), and *Ackroyd v. Smithson* (ante, vol. i. p. 503).

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Mr. *Fonblanque* (for *Frances Johnson* the representative of *William Johnson*, the brother of the testator, and *Elizabeth Hastings*, the widow of *Johnson* the son) contended—that if *William Johnson* was entitled, as next of kin at the time of the testator's decease, his representatives must be entitled now. The whole fund is converted into personalty, and must pass as such, as in the case of *Mallabar v. Mallabar*, For. 78, and *Durour v. Motteux*, 1 Ves. 320, where it was held not to be a resulting trust for the heir. Whatever would go to the executor, if he were not excluded, must, where he is so, go to the next of kin. In this case, if not excluded, the executor must have taken the whole. In *Digby v. Legard*, and *Smithson v. Ackroyd*, the real estate was converted into personalty only for certain purposes; but here it was converted for all purposes.

Lord Chancellor (during the argument) said—it was plain the testator meant by *next of kin*, some class of persons of whom it was doubtful whether they would live ten years, and it was meant that they should pass through that chance. The question was whether he was at liberty to take notice that, at that time, he had but one brother. If he had had several brothers, and nephews sons of brothers, there would not have been a doubt that the division must have been among such of them as survived at the end of the ten years; and if the brother would have taken had he lived, dying within the ten years, it would be undisposed of (a).

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At the close of the argument, he said, it appeared to him to be lapsed; and he did not see how the heir could be disappointed. The decree therefore declared that, by the disposition of the rest

(a) The meaning of “next of kin,” always is, those who are so at the time of the death of the testator, *Anderson v. Dawson*, 15 Ves. 537. and therefore where an estate for life has been given, with such a limitation over, the de-

scription has been held to comprise such as were testator's next of kin at the time of his death, not at the time of the limitation taking effect, *Masters v. Hooper*, post, vol. iv. 207. *Doe v. Lawson*, 3 East, 278.

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and residue of the testator's personal estate, or the money arising therefrom, the produce of the real estate, as well as personal estate, was intended to pass; but that *William Johnson*, the only next of kin of the testator living at his death, having died before the end of ten years, from the death of the testator, the disposition of five-sixths of that fund hath lapsed, and it is to be considered as undisposed: and so much thereof as arose from the real estate, belongs to the heir at law of the testator (a), and so much as hath arisen from the personal estate belongs to the representative of *William Johnson* the sole next of kin; and the Master was directed to inquire how much had arisen from each fund: and the other sixth part was declared to belong to the personal representative of *William Johnson* the son.

(a) Vide the Editor's note to *Acleroyd v. Smithson*, ante, vol. i. 503.

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Hall, 6th August.

KNOX v. SIMMONDS.

The submission to an award was, that it should be made on or before the first day of *Michaelmas Term*: the time was enlarged till the first day of *Hilary Term*.—The award was made on the first day of *Hilary Term*: It is good, and the word "till" is for this purpose inclusive. Where there is a non-performance of an award, the proper motion is, that the party may stand committed; not for an attachment; but the notice of motion must be served personally.

THIS was a bill filed to be discharged from a purchase, to a very considerable amount, on account of the value of the estate being very inferior to the price agreed to be paid, by means of gross misrepresentations on the part of the vendor and his agents.

As the articles stated to be misrepresented were very numerous, and the evidence from which the misrepresentation was to be gathered, was very long and complicated, it was agreed by the parties to refer it to arbitration; it was accordingly referred, and a submission entered into by the parties, to the award which should be made, but the submission did not contain the words "and undertake to perform" and the award was to be made *on or before the first day of Michaelmas Term*.

The parties went before the arbitrator; and the matter taking a great deal of time, the time for making the award was enlarged, upon motion in *Michaelmas Term*, by consent, till the first day of *Hilary Term*.

The arbitrator finding several articles of the purchase rated at too high a value, but that, on the other hand, several articles were thrown in, and no price charged for them, by which, upon the whole, the purchase was not over-rated, confirmed the purchase; but directed the purchase-money to be paid by instalments.

The time for payment of the first instalment being past, and the money not paid, two motions were made; one, on the part of the plaintiff, to set aside the award; the other, on the part of the defendant, for an attachment for non-performance of the award.

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The two motions came on together on the 20th June last.

Mr. Solicitor-General, Mr. Mansfield, and Mr. Hollist, supported their motion for setting aside the award, on two grounds, first that the award was formerly defective, it not having been made in due time, by which means the arbitrator's authority was gone. The award, at first, was to have been made *on or before* the first day of *Michaelmas Term*; the enlarged time was, until the first day of *Hilary Term*, which is exclusive of the day on which the award was made: the award therefore was void; all the cases hold the word *till*, to be exclusive of the day, *Nicholls v. Ramsey*, 2 Mod. 280, was a release of all actions *till* 26th April; this was held to be no bar to an action, upon a bond dated on that day. So in *Bligh v. Trefrey*, Palm. 531, where it was from *Michaelmas 1 Charles*, to *Michaelmas 2 Charles*, and it was argued there could not be two *Michaelmas-days* in one year. *Newman v. Beaumont*, Owen, 50. Second, upon the ground of a mistake in the arbitrator, who ought not to have set the articles in the purchase which were thrown in, against the over-charge in the other parcels. This they argued at great length, from the particular circumstances of the case, and said, that the mistake of the arbitrator, either in matter of fact or of law, was a good reason for setting aside the award, as appears by the case of *Ridout v. Paine*, 3 Atk. 494, although no bill will lie against the arbitrator, but only against the party in whose favour the award is made. 3 Atk. 644.

Mr. Attorney-General, and Mr. Douglas, for the defendant, in support of the award, said—upon the formal objection, that the order for enlarging the time merely meant to substitute the second day named for the first, that is, the first day of *Hilary Term*, for the first day of *Michaelmas Term*, a mere erasure of the former, and an insertion of the latter. As an award therefore bearing date on the first day of *Michaelmas Term*, would have been undoubtedly good, so is the award bearing date the first day of *Hilary*. The word *until* is inclusive or exclusive, according to the nature of the case; where it is *until* the delivery of the deed, it is exclusive, but where it is to a time to come, it is inclusive of the day named. It is like the word *from*, which has been held to be either inclusive or exclusive. In *Pugh v. The Duke of Leeds*, Cowp. 714, the word *from* was held to include the day of the date of the leases.—Lord Mansfield there pronounced a very solemn judgment, and if this is so in respect to the *terminus a quo*, the construction must be the same as to the *terminus ad quem*. If the word is at all equivocal, the construction which will substantiate the act of the party must prevail. But there are other cases, especially those on the poor laws, in which, in order to support the settlement, the word *until* has been held to be inclusive, as *The King v. Navestock*, Burrow's Settl. Cases, 719. Bott, 387.

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The King v. Syderstone, Cald. Cas. 19. *The King v. Skiplam*, 1 T. R. 490.

They also went at large into the subject of the second objection, and argued that the award was proper, and ought not to be set aside.

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Mr. *Solicitor-General*, in reply, admitted—that the word *until*, is inclusive or exclusive, according to the subject, but that it is naturally exclusive appears from 5 Co. 94 b. this is illustrated by the cases from the poor laws, where it being necessary that there should be a service for a year to obtain the settlement, the word has been held inclusive for that purpose. In the case of *Pugh v. The Duke of Leeds*, the authorities cited would hardly maintain the position; but the principle will bear it out, by a presumption that the lease was executed the last moment of the day. With respect to arbitrations at *nisi prius*, it is always held exclusive.

2. If the arbitrator has made a clear mistake of the law, the award must be set aside. Whether the Court set aside the award or not, it is discretionary whether it will grant an attachment.

Lord Chancellor said—he thought it impossible to impeach the award in this way: that it was an enlargement of the time in *statu quo*, and therefore must include the first day of *Hilary Term* (a), and being satisfied with the award, upon the circumstances of the case, he ordered it to stand (b).

The motion for the attachment stood over, and was afterwards waived, and this day Mr. *Attorney-General* moved, that the plaintiff might stand committed for non-performance of the award.

(a) The question whether the word *until* should be construed *exclusive*, or *inclusive* of the day to which it is applied, was very elaborately discussed, in *The King v. Sterens*, 5 East, 244. It was contended, that it must be considered as *exclusive* upon the authority of *Nicholls v. Ramsden*, 2 Mod. 280. and *Newman v. Beaumont*, Owen, 50. and by analogy to the word *unto*, which, in *The King v. Gamlingay*, 3 T. R. 513. was holden to be *exclusive* of place. The Court, however, upon the ground that the words *to*, *from*, *until*, &c. were evidently used by writers both in an inclusive and exclusive sense; that if the word *until* had occurred in a contract, and the context or subject-matter shewed that it was meant in an *inclusive* sense, in furtherance of such intention, it would so be construed: accordingly in that case (which was upon an indictment),

determined that *until*, might be construed either *exclusive* or *inclusive* of the day to which it is applied, according to the context and subject-matter.

(b) His Lordship's reasons upon the second point, are given at length in Mr. *Vesey's* report; they are in part to the effect so frequently alluded to upon this doctrine, that in case of mistake, it must be made out to the satisfaction of the arbitrator; and the party must convince him that his judgment was influenced by that mistake, and that if it had not happened, he should have made a different award: as to which it has been stated, that Lord *Thurlow* used to require the affidavit of the arbitrator, vide *Price v. Williams*, ante, 163. 1 Ves. jun. 365. *Morgan v. Mather*, 2 Ves. jun. 15. *Dick v. Miligan*, post, vol. iv. 117. 2 Ves. jun. 23. *Anderson v. Darcy*, 18 Ves. 449.

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The notice of motion had been given to the clerk in Court, not to the plaintiff personally.

Lord Chancellor said—he had enquired into the practice, and that this was the proper motion, not a motion for an attachment; that he had copies of many submissions; that it was true they contained the words “and undertake to perform,” but if a submission was by parol, it would amount to a promise to perform, upon which an action would lie.

But the service of notice must be personal, not on the clerk in Court; the cause being, by the reference, out of Court.

But on service of a writ of execution of the order, and personal service of notice of motion, a motion for an attachment might be made, though there was no submission to perform the award, or the submission was not made a rule of Court.

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CAVIL v. SMITH.

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Lincoln's-Inn
Hall, 6th August.

THERE having been an order for the payment of money, and the party being in contempt for non-payment, and a sequestration having issued, and goods being taken; the sequestrators were ordered to sell the goods: upon the motion of Mr. Richards (a).

Sequestrators ordered to sell the goods where the party is in contempt for non-payment of money.

(a) It seems that this motion must be upon notice given, *Mitchell v. Draper*, 9 Ves. 208. See the present case, cited in *Dunkley v. Scribner*, 2 Mad.

Rep. 444. For the general doctrine upon this subject, see the Editor's note to the case of *Hales v. Shafto*, ante, 72.

HEYGATE v. ANNESLEY.

Lincoln's-Inn
Hall, 8th August.

A SUM of money *having been ordered* to be paid to the husband in right of his wife, he died before payment; and upon the wife's application for the money, the executor submitted whether he was not, as such, entitled to it. *Lord Chancellor* held it was a vested interest in the husband, and ordered it to be paid to the executor (a).

Money ordered to be paid to husband in right of wife, a vested interest in him.

(a) So in *Forbes v. Phipps*, 1 Eden, 502. where a feme covert being entitled to a share of the residue of a testator's estate, upon a bill filed by another residuary legatee to which she and her husband were defendants, a decree had been made for a sale of the

estate, and payment. *Lord Northington* held, that the share vested absolutely in the husband, by the decree, and that the wife surviving, was not entitled.

At law, the wife's *chose in action* not reduced into possession by the husband survive to her, and her equitable

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equitable interests in the same case do so in equity. So her terms of years, and other chattels real, which are in possession already, and do not lie in action, will survive, if no act is done by him: but he may assign them at law, with or without consideration, and the analogy is followed in equity, *Lord Carteret v. Paschall*, 3 P. W. 197. *Mitford v. Mitford*, 9 Ves. 98. But here the analogy stops, for in strictness, as observed by Sir William Grant, (ib.) equitable interests of the nature of *choses in action*, ought not to be affected by the husband's assignment; *choses in action* not being assignable at law: in equity however, a distinction has been made between a voluntary assignment, and an assignment for valuable consideration: the wife surviving, being bound by the latter, not by his voluntary assignment, *Burnet v. Kynaston*, 2 Vern. 401. *Lord Carteret v. Paschall*, sup. *Bates v. Dandy*, 2 Atk. 207. *Mitford v. Mitford*, sup.

What other acts of the husband, besides assignment for valuable consideration, shall be considered sufficient to reduce her *choses in action* into possession, is a question which has given rise to several cases. Filing a bill in equity, will not have this effect. *Anon.* 3 Atk. 726. Nor an agreement between the husband and wife, for settling the *chose in action*, if he die previous to the completion of the agreement, *Fort v. Fort*, Forr. 171. Nor an admission to the husband by an executor, and an appropriation for the purpose of payment. *Blount v. Bestland*, 5 Ves. 515. Nor a transfer by an administrator of a share under an intestacy to the wife's separate use, in her name, *Wildman v. Wildman*, 9 Ves. 174. See also *Nash v. Nash*, 2 Mad. Rep. 133. Nor the general assignment in bankruptcy, *Mitford v. Mitford*, cit. sup. over-ruling *Pringle v. Hodgson*, 3 Ves. 619. Nor the assignment under the insolvent acts, *Hornsby v. Lee*, 2 Mad. Rep. 16.

In a case in *Alcyn*, 36, cited by Lord Hardwicke, in *Garforth v. Bradley*, 2 Ves. 675. it is said that the husband's bringing an action in his own name, and obtaining judgment, will prevent its surviving; but Lord Couper, in *Packer v. Wyndham*, Prec. Chan. 415. and Lord Hardwicke, in *Bond v. Simmonds*, 3 Atk. 20. considered that it would not have that effect if he died before execution; there-

fore the determination of Lord Jeffries, in *Oglander v. Baston*, 1 Vern. 596, that a sum of money awarded to the husband was in the nature of a judgment, and had changed the property, though relied upon by Lord Northington, in *Forbes v. Phipps*, cit. ante, seems extremely doubtful. This also renders it questionable how far a decree of a Court of equity would of itself have this effect: though equal in extent and operation to a judgment at law, (*Morrice v. The Bank of England*, Forr. 217.) it does not appear to be superior to it; and as observed by Sir W. Grant, in *Richards v. Chambers*, 10 Ves. 587. a decree or judgment of a Court does not pass property, but merely declares the right existing by antecedent title and disposition. This however is clear, that where the money had been paid into Court under a decree for the husband to propose a settlement, such payment could not give him the absolute interest in the property, *Bond v. Simmonds*, cit. sup. *Macaulay v. Philips*, 4 Ves. 15. the determination in *Packer v. Wyndham*, sup. in opposition to this being obviously incorrect.

Mr. Clancey, in his valuable Essay upon the Rights of Married Women, 359, suggests that these cases have shaken the authority of Lord Northington's decision in *Forbes v. Phipps*: and whenever the question comes to be reconsidered, it certainly will be open to discussion, whether the direction contained in the decree for payment, like the order in the present case, changed the property and vested it in the husband, or left it, as in the case of a judgment at law, where the husband dies before execution. Such a case however, is widely different from those of *Bond v. Simmonds*, and *Macaulay v. Philips*, where it was expressly said, that the payment into Court did not change the property: the Court thereby merely substituting itself for the trustee. Taking the fund into its hand, and exercising its usual equity, it refuses to pay out that fund, except upon the condition mentioned in the order, which, to use the language of the counsel in *Packer v. Wyndham*, is in the nature of a condition precedent: and the husband not having performed his part thereof, has no title to the fortune. But in the other case the Court not exercising any controul over the fund, declares the rights of the parties and orders payment. The whole transaction

transaction is completed: in which respect it differs from a judgment at law, where an ulterior step must be taken by the party recovering to make it operate against the thing recovered, viz. suing out a writ of execution.

It may here be noticed that an error

has crept into the marginal abstract of the above cited case of *Forbes v. Phipps*, it being printed "that her share vested absolutely in the husband by survivorship," instead of, "by the decree."

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CRESWELL v. BYRON.

Lincoln's-Inn
Hall, 9th August

A LEASEHOLD estate was settled (previous to marriage) upon the wife, "in recompence and bar of dower, and for a provision for the wife:" the husband had no real estate; and the question was, whether this was a bar to the wife's claim of thirds. Lord Chancellor held it was not (a).

Leasehold estate settled "in lieu of dower," is not a bar of thirds.

(a) Vide *Carruthers v. Carruthers*, post, vol. iv. 500.

Ex parte BATSON and Others in the Matter of GOOCH and COTTON, Bankrupts.

Lincoln's-Inn
Hall, 10th August.

BY indenture, bearing date 20th August, 1783, Gooch and Cotton assigned to Lindegreen and Co. (among other things) by way of mortgage, the ship *Nautilus*, together with all deeds, &c. as a security of several sums of money then due, or which, in the course of their trade, should become due from Gooch and Cotton to Lindegreen and Co.

By indentures of lease and release of the 17th and 18th Sept. 1783, reciting the said indenture, Lindegreen and Co. assigned the said ship (among other things) to the petitioners by way of mortgage, as a security for sums of money then due to them.

On the 7th October, 1783, a commission was issued against Lindegreen and Co. and on the 4th October, 1783, a commission was issued against Gooch and Cotton.

At the time of the mortgage made by Gooch and Cotton to Lindegreen and Co. (20th August, 1783) the ship *Nautilus* was at Dublin, where she remained till the 14th September, when she sailed for Cadiz, from whence she returned to Great Yarmouth. No actual possession was given of her by Gooch and Cotton to Lindegreen and Co. but an insurance was made by them, 19th August, for twelve months. On the 9th October, 1783, Gooch and Cotton were served with notice of the ships, (of which the *Nautilus* was one) with their bills of sale, being assigned by Lindegreen and Co. to the petitioners. In March 1784, the petitioners had notice of

Mortgage of a ship in the port of Dublin, and delivery of muniments, the mortgagee insured her there, and made a

[363] second mortgage; the second mortgagee took possession as soon as he was informed she was in an English port; this is a sufficient possession to take it out of the statute of 21 Jac. c. 19.

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of the *Nautilus* having arrived at *Great Yarmouth*; and on the 1st of *April* gave authority to their solicitors, in writing, to take possession, and on the 5th of *April*, possession was taken of the ship for the petitioners, and the master signed a memorandum, by which he declared that he kept possession for them. The ship had been since sold.

The prayer of the petition was, that the right of the petitioners to the ship, and the money arising therefrom, might be declared and established to them.

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Mr. *Mansfield* and Mr. *Cooke*, for the petitioners, contended—that the ship was not left in possession of the bankrupts, within the meaning of the clause 21 *James*, c. 19. s. 11. “that if any persons at the time they become bankrupts, shall, by the consent of the true owner, have in their possession, order, and disposition, goods, whereof they shall be reputed owners, the commissioners shall have power to sell the same.” That here was a sufficient delivery to the petitioners to take the case out of the statute. There was, in fact, all the delivery the nature of the property admitted. Where a ship is beyond sea, the delivery of the muni-ments is a sufficient giving possession. This has been held to be so where the ship is at sea. It is the same thing if she is in a foreign port, *Brown v. Heathcot*, 1 Atk. 160. The party must have time to send out to take possession, if actual possession is necessary, *Atkinson v. Mayling*, 2 T. R. 462. Here possession was taken as soon as she arrived in an *English* port.

Mr. *Solicitor-General* and Mr. *Campbell*, for the assignees.—The ship continued at *Dublin* from the 20th of *August* to the 1st of *September*; during that time possession might have been taken. It was incumbent on *Lindgreen* and Co., under whom the petitioners claim, to do all they could to get possession of the ship; they ought, at least, to have given notice to the master. The only reason why ships are not within the general rule, is from the impossibility, when they are at sea, of giving possession. It is upon this ground that it was put by Justices *Ashurst* and *Buller*, in the case in the Term Reports. In *Ex parte Matthews*, 2 Ves. 272, it is said, a mortgage may be made of a ship at sea, but the mortgagee must take all the methods in his power to get possession. Here there was a month, during which possession might have been obtained by putting a person on board, or giving notice to the master; for which they might have obtained a warrant from the mortgagors.

Lord Chancellor.—If the ship had been chartered from *Dublin* to *Cudiz*, with liberty to touch at a port in *England*, has it ever been held that the mortgagee was bound to give notice? If there had been a new voyage commenced under the authority of *Gooch*
and

and Cotton, that would have made the case different; here the insurance was for a voyage, beginning from *Dublin*. When the ship is chartered, and the voyage begun, it would be difficult to take possession. A notice to the captain would be to stop the voyage.

His Lordship granted the prayer of the petition (a).

(a) The transfer or mortgage of a ship or cargo at sea, is generally made by an assignment of the bills of lading, &c. but a bill of lading is by no means a necessary instrument for the transfer of property in goods consigned to the owner. If the best delivery is given that the nature of the case will admit of, it will take it out of the statute. *Brown v. Heathcote*, 1 Atk. 160. *Ex parte Matthews*, 2 Ves. 272. *Gillespy v. Coutts*, Amb. 652. *Atkinson v. Mailing*, 2 T. R. 464. *Ex parte Stadgroom*, 1 Ves. jun. 163. 2 Cox, 234.

Manton v. Moore, 7 T. R. 67. *Jones v. Dwyer*, 15 East, 21. *Meyer v. Sharpe*, 5 Taunt. 74. But the delivery of the grand bill of sale will not be sufficient if there has been an opportunity of taking possession, *Ex parte Matthews*, cited ante. *Hall v. Gurney*, Co. B. L. 333. If no documents exist, the party to whom the ship or goods are assigned over, should be ready at the spot where the ship is expected to arrive, in order to be ready to take immediate possession. *Philpot v. Williams*, 2 Eden, 221.

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RIGGE v. BOWATER (a).

LORD Chancellor intimated his opinion (without deciding the Receiver. case), that if a receiver be appointed by the Court (upon the application of a mortgagee or other incumbrancer), and he afterwards embezzle, or otherwise waste the rents and profits, the loss must fall on the mortgagor.

(a) Where a loss happens by the default of a trustee appointed by the testator, the estate is discharged from it. *Carler v. Barnardiston*, 1 P. W. 518. citing *Anon.* 1 Salk. 153. So where a trustee was appointed by creditors to receive rents for the payment of debts,

a loss arising from the failure of the trustee was directed to be borne by the creditors, and the estate was discharged from it. The present case being held not to apply. *Hutchinson v. Lord Massaresne*, 2 Ba. & Be. 49.

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PARSONS v. NEVILLE.

Parties.

BILL, by some of the residuary devisees, on behalf of themselves, and the other devisees.

By *Lord Chancellor*, all the devisees must be parties (a).

(a) See the cases cited in the Editor's notes to the *Duke of Queensberry v. Cullen*, ante, vol. i. 101, and *Lawson v. Barker*, ib. 303; also *Morse v. Sadler*, 1 Cox, 352.



STRANGE v. HARRIS, Executor.

Payment of money into Court.

THE Court will now, *immediately* upon coming in of defendant's answer, order so much as he admits to have in his hands of the testator's property, to be paid into the bank. It was formerly thought necessary for the plaintiff to shew that the executor had abused his trust, or that the fund was in danger from the insolvent circumstances of the executor (a).

(a) This was also stated to be the present practice by Lord *Redesdale*, in *Blake v. Blake*, 2 Sch. & Lef. 26. Et vide *Hare v. Harrison*, 2 Cox, 377. But a balance must be admitted, *Rutherford v. Dawson*, 2 Ba. & Be. 17. As to what shall be considered a sufficient admission upon which to found such a motion, vide *Roberts v. Hartley*, ante, vol. i. 57. *Fox v. Mackreth*, ante, 45. and particularly Lord *Eldon's* observations cited in the note to the latter case.



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(m) LIKE and Others v. BERRESFORD and Others.
14th November.

Court will not, upon motion, make an order which will decide the merits of the cause.

BILL, by plaintiffs, creditors of the defendant *Berresford*, on behalf of themselves and other creditors, claiming to be entitled, under an assignment from him, for the benefit of plaintiffs and other creditors, of all his right to, and in funds in Court, the property of his wife (formerly Miss *Hamilton*). A suit had been instituted by the wife's trustees, and the usual order had been made for Mr. *Berresford* to lay proposals for a settlement before the Master; and the assignment was pending the reference. The consideration of it was necessities supplied, and money lent, by which both the husband and wife had been for some time supported. The husband consented to settle the whole fund to the wife's separate use, and the settlement was accordingly made, and the funds transferred to the trustees.

(m) Bill dismissed by his Honor at the Rolls, 8th August, 1797, 3 Ves. 506.

The

The bill impeached this settlement as fraudulent, and particularly insisted on the husband's right in the dividends which had accrued during the coverture, and the plaintiff's right to the same by virtue of the assignment, and therefore prayed, that the funds, and particularly the dividends, might be declared to be subject to their claim, and that the trustees might not part with them, or proceed upon the trusts of the settlement.

Mr. Berresford moved—that the trustees might be directed to pay the dividends to him. The plaintiffs had notice of motion, but did not appear.

Lord Chancellor was of opinion—that even, with the plaintiff's consent, he could not make any order, the object of the motion involving the principal point in the cause.

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LIKE
BERRSFORD.

WEEDEN BUTLER and CARREW ELMERS,

- Plaintiffs.

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ROBERT CAMPION STRATTON, JOHN STRATTON, an Infant, (by PETER WOODHEAD, his Guardian), FRANCIS PATTERSON, SARAH PATTERSON, ANN PATTERSON, and THOMAS PATTERSON, Infants, (by ZACHARY PHILIPS, their Guardian), FRANCIS FAIRBANK, WILLIAM FAIRBANK, and ANN FAIRBANK, an Infant, (by WILLIAM DYER, her Guardian), ELIZABETH FAIRBANK, and MARY FAIRBANK, Infants, (by JAMES DRIVER, their Guardian), JOHN PEARCE, GEORGE PENLEAZE, and ELIZABETH his Wife, ROBERT SHAW, THOMAS ROGERS, and ELIZABETH his Wife, THOMAS PERKINS, and JOHN MURPHY, and ANN his Wife, THOMAS JACKSON, and GEORGE LANGDALE, - - - -

Defendants.

REBECCA STRATTON made her will as follows: "I give, devise, and bequeath unto the said Weeden Butler, Carrew Elers, and the survivor of them, and his heirs, all those my said three freehold messuages or tenements, with all and singular the rights, members, and appurtenances, to the same belonging, or in anywise appertaining, as the same are situate in Coleman Street, London, aforesaid, and are now in the occupation of Charles Leuder, his under-tenants or assigns, in trust to sell the same, and the clear money arising by such sale, to pay and divide equally between Robert Campion Stratton, of Cole Stairs, Shadwell,

Legacy " to A. and B. the children of C. equally," they take per capita.
Legacy " to the descendants of A. and B. equally," all descendants (children and grandchildren) take per capita.

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~
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v.
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“*Shadwell*, lighterman, grandson of *William Stration*, late of
“*Whitecross Street*, in the county of *Middlesex*, victualler, *John*
“*Stratton*, of *Deptford*, in the county of *Kent*, son of *Thomas*
“*Stratton*, shipwright, deceased, and the children of *Mary Patter-*
“son, wife of ——— *Patterson*, of *Wendover*, in the county of
“*Bucks*, and as to all the rest and residue of my freehold and
“personal estates, of what nature or kind soever, or wheresoever,
“I give, devise, and bequeath the same unto the said *Weeden*
“*Butler* and *Carew Elers*, and the survivor of them, and his heirs,
“executors, or administrators, in trust to sell the real estates, and
“the money arising clearly therefrom, together with the personal,
“to divide *equally* between the descendants of *Thomas Fair-*
“*bank*, formerly of *Marston*, in the county of *York*, gent. de-
“ceased.”

The testatrix died 9th *March*, 1788, whereupon the trustees and executors filed their bill to have the necessary accounts taken, and the rights of the parties declared.

Upon the first hearing, 11th *February*, 1790, it was referred to the Master, to enquire who were the children of *Elizabeth* (by mistake in the will called *Mary*) *Patterson*, and who were the descendants of *Thomas Fairbank*, at the time of the testatrix's death, and what real estates passed by testatrix's will, and to whom.

The Master, by his report, 2d *August*, 1791, stated—that there were four children of *Elizabeth Patterson* alive at testatrix's death, and still living, and that the *Strattons* claimed to divide the produce of the *Coleman Street* estate with the *Pattersons*, *per stirpes*, whereas the *Pattersons* insisted on dividing it *per capita*. Also he certified, that at testatrix's death there were living three sons of *Thomas Fairbank* and eleven grand-children.

Mr. *Abbot*, for the *Pattersons*.—We claim to divide this fund *per capita*, in one-sixths, and not in one-thirds. 1st. Because the right of representation is no primary rule for construing the intention, but only a technical rule of distribution for intestates. In 1 P. W. 340, *Northey v. Strange*, it was said the children take not by representation. So 2 P. W. 383, *Blackler v. Webb*, they take as if named individually. So 2 Vern. 705, *Weld v. Bradbury*, they take as claiming in their own right, and not as representing parents.

But 2dly, even if they would otherwise take by representation, the word “*equally*,” applied even to the next of kin, or relations under the statute of distribution, causes a division *per capita*. *Thomas v. Hole*, Forr. 251. *Green v. Howard*, (ante, vol. i. p. 31.) *Philips v. Garth*, (ante, 64.)

Mr.

Mr. Mitford, *contra*, for the Strattons, attempted to distinguish these cases, but Lord Chancellor thought there was no room for it.

Mr. Steele (for the sons of Thomas Fairbank) argued, 1st, That the legacy to the descendants of Thomas Fairbank means those who, at the time of taking, would be entitled by the statute of distribution; for the word "relations" had been always so confined, though no case is to be found as to "descendants." In *Crossly v. Clare*, stated in the note to *Pierson v. Garnet*, (ante, vol. ii. p. 228. n.) Sir Thomas Clarke seems to have said, that *descendants* are equivalent to *heirs* of real estate, and so equivalent to the next of kin of personal estate: but Mr. Ambler, in his report of the same case, p. 397, gives a different account of Sir T. Clarke's language.

Mr. Solicitor-General (for the grand-children of Thomas Fairbank) argued, 1st, That the word "descendants" includes more remote descendants than those within the statute: 2d, That they must take *per capita*. On the first point there is no decision to confine "descendants" to the same sense as "relations."

Lord Chancellor.—It does not go on the same principle.

Mr. Solicitor-General.—The meaning of *relations* is confined for convenience sake. Sir T. Clarke says, in *Ambler*, a devise to descendants would be good, and excludes the grand-children only, because born after the will, the devise being to those *now living*, i. e. at the time of the will.

Lord Chancellor.—Sir Thomas Clarke must, on his own principle, mean to divide *per capita*.

Mr. Solicitor-General.—In *Pierson v. Garnet*, (ante, vol. ii. p. 38. and 226.) this Court said, as the Master of the Rolls had said before, that a gift to descendants means to limit it to such relations as are descendants; but Mr. Pierson being still alive, it was not necessary in that case then to decide whether *per capita* or not.

The second point. Also, if "descendants" are equivalent to "relations," or to be construed in the same way, then, by the case of *Thomas v. Hole*, "equally" will have the effect of making them take *per capita*. For. 251. So *Green v. Howard*, (ante, vol. i. p. 31). So *Blackler v. Webb*, 2 P. W. 383.

Lord Chancellor.—Between the Strattons and Pattersons the legacy must be divided *per capita*: and all Fairbank's descendants

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ants must take, as well grand-children as children, and all *per capita* (a).

(a) Vide the Editor's note to *Phillips v. Garth*, ante, 70, where all the cases are cited. Vide also *Davenport v. Hanbury*, 3 Ves. 257, 383. and *Freeman v. Paisley*, ib. 421.

S. C.

2 Dick. 750.

1 Ves. jun. 398.

Witness re-examined, when there has been a mistake, on special application, and the mistake apparent.

SANDFORD v. PAUL.

MR. Mansfield moved, that a witness who had been examined in chief, might be re-examined before the master; suggesting, that at his first examination, he was interested, having executed a partial release instead of a general one.

Mr. Solicitor-General opposed the motion, upon the ground of the great inconvenience that might result from such a practice; as, by this means, having got from a witness what he knew, he might be tampered with afterwards to amend his evidence.

Lord Chancellor granted the motion, founding himself upon this being a special application, and upon special grounds, the mistake and accident which had happened, by which the witness had executed a partial instead of a general release (a).

(a) There is a very full note of this case in *Vesey*, and in *Mr. Dickens Reports* of the observations submitted by that gentleman to the Court, vide also upon this subject, *Sawyer v. Bowyer*, ante, vol. i. 338. *Vaughan v. Lloyd*, 1 Cox, 312. *Ingram v. Mitchell*, 5 Ves. 387. *Smith v. Althus*, 11 Ves. 364. *Kirk v. Kirk*, 15 Ves. 280, 285. *Purcell v. Macnamara*, 17 Ves. 484. *Lord Abergavenny v. Powell*, 1 Meriv. 130.

SHEARMAN v. SHEARMAN.

To obtain a *ne exeat regno* a certain sum must be sworn to, and there must be good ground for the suggestion that the party means to abscond.

MR. Hollist moved for a *ne exeat regno* against the defendant, who was sued as an administratrix. The affidavits stated threats of absconding, and of embezzling the effects of the testator; which might, according to general computation, be worth about £2,000:

He cited 2 Vent. 345.

Lord Chancellor refused the motion, considering the affidavits as too loose, and that no sum was positively sworn to, so that there was no precise sum for which the writ could be marked; also that there was not sufficient ground stated for the suggestion that the defendant was going abroad (a).

(a) Except where it is matter of pure account, the Court will not grant this writ upon an affidavit, stating merely information and belief, as to the amount of

of the debt, *Roddam v. Hetherington*, 5 Ves. 91. *Jones v. Sampson*, 8 Ves. 593. *Amsinck v. Barclay*, ib. 594. *Jackson v. Petrie*, 10 Ves. 164. and a mere affidavit of belief that the defendant is going abroad, is not sufficient: it must contain circumstances or declarations, shewing the ground of such belief; but it will be sufficient to state

that the debt will be endangered, without stating that it is to avoid the jurisdiction, *Oldham v. Oldham*, 7 Ves. 410. *Etches v. Lance*, ib. 417. *Hemming v. M'Entire*, 11 Ves. 54. *Jones v. Alephsin*, 16 Ves. 470. see more upon this subject in *Atkinson v. Leonard*, ante, 218. and Mr. Beames's Brief View, 25, et seq.

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GREEN v. CHARNOCK.

S. C.
2 Cox, 284.

MR. *Lloyd* and Mr. *Richards* had moved, in the term, that all the proceedings might be stayed till the plaintiff had given the usual security to the two senior six clerks, not towards the cause, for payment of costs, the plaintiff stating himself, by his bill, to be on a voyage to *New York in America*, and they cited *Meliorucchy v. Meliorucchy*, 2 Ves. 24. Security for costs.

Mr. *Solicitor-General* and Mr. *Abbot*, for the plaintiff, insisted, that this was not sufficient to compel security for costs; as it ought for that purpose, to appear that the plaintiff is resident, or going to reside abroad, and that such was the rule laid down, Pract. Reg. 117, analogous to the practice in the *King's Bench*. *Fitzgerald v. Whitmore*, 1 T. R. 362. Also, that this being an injunction suit, plaintiff would not be compellable, in the Exchequer, to give security, he being in a manner forced to come into equity by the action against him at law. *Fenwick v. Fortescue*, Bunb. 272.

Mr. *Richards* denied that the Exchequer practice was so at present.

Lord Chancellor thought this was not sufficient evidence to the Court that the plaintiff was resident abroad; otherwise, merely being at sea upon a fishing party, would be a reason to compel giving security.

The motion stood over, and this day the defendant produced an affidavit that the plaintiff was gone to reside in *America*.

Lord Chancellor said, from the best inquiry he could make, the mere description in the bill was not sufficient evidence of the plaintiff's living abroad to call for security; that the general rule is, that the plaintiff must appear to be resident abroad; and that he mentioned it now, that the general rule might be known (a).

(a) So in *Hoby v. Hitchcock*, 5 Ves. 699. the simple fact of the plaintiff's having been gone abroad, is not sufficient ground to compel him to give se-

curity. As to the time when this application is to be made, vide *Craig v. Bolton*, ante, vol. ii. 609.

JORDAN

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Lincoln's-Inn
Hall, 6th Dec.
Practice.
Plea must be set
down within
eight days.

JORDAN v. SAWKINS.

MR. *Solicitor-General* moved to discharge an order that had been obtained, by the defendant, to set down his plea; the eight days in which it ought to have been entered having expired, and the plaintiff having filed exceptions to the defendant's answer, and the order having been obtained without a special application; the entry of the plea was antedated.

Mr. *Abbot* stated the omission to have been occasioned by a slip:

But *Lord Chancellor* seemed to think the rule ought to be complied with; and that if the defendant did not enter his plea within the eight days, he must be presumed to have abandoned it (a).

(a) 1 Turn. & Ven. 491.

Lincoln's-Inn
Hall, same day.
Practice.
Motion for pay-
ing in money.

VICKERY v. ——— (a).

MR. *Lloyd* moved that the plaintiff's solicitor, who, upon taxation of costs, appeared to have received a considerable sum more than the amount of his costs, and who had been served with an order to pay the same, which he had not obeyed, should stand committed.

Lord Chancellor stated the practice to be, that if you want an attachment, you must go to the office; but if you want a more summary proceeding, you must move that the party pay in the money by a short day, or stand committed. And his Lordship made such an order in the present case (b).

(a) The name of this case is *Vickery* v. *Stocker*, Reg. Lib. B. 1791. fol. 28. (b) Vide *Strange* v. *Harris*, ante, 365. and the Editor's note.

Lincoln's-Inn
Hall, same day.

EAST INDIA COMPANY v. HENCHMAN.

Practice.
Demurrer.

MR. *Stratford* moved that a demurrer put in by the defendant might be taken off the file, the defendant having demurred after the time for answering was out, but before any process of contempt had issued, the defendant's clerk in Court having informed the plaintiffs' clerk in Court that the defendant had obtained an order for time.

Lord

Chancellor was of opinion, that the defendant, till *affected* *process of contempt*, might put in a demurrer at any time, and *Mitford* referred to the order for time, as shewing that the defendant, after the eight days, is not considered as being in contempt, unless affected by an attachment; the words of the order that the defendant is not in contempt, and he also observed, the condition, not to demur alone, proved it (a).

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vide also *Sowerby v. Warder*, 268. But that a demurrer may be filed after an injunction obtained, *a dedimus. Edmonds v. Savery*, 304. For the general doctrine on this subject, vide Mr. Swanwick to *Curzon v. Ld. De la Zouch*, 185. The demurrer, in the case, was afterwards allowed

by Lord *Thurlow*, Reg. Lib. A. 1791. fol. 42. 1 Ves. jun. 287. It was afterwards re-heard before Lord *Rosslyn*, in March 1794, when he reversed Lord *Thurlow's* order, and that reversal was afterwards affirmed in Dom. Proc. 21st June, 1797. 8 Bro. P. C. Ed. Toml. 85.

CRAWLEY v. CLARKE.

Lincoln's-Inn
Hall, 9th Dec.

Abbot moved for a sequestration *nisi* against Lord *Sempill* and his wife, for non-payment of money decreed to be paid to the defendant *Clarke*, producing, in support of his motion, the writ of execution under seal, a letter of attorney to *Clarke* to demand the money, an affidavit of the due execution of the letter of attorney, and an affidavit of the demand being made. Practice. Sequestration.

Chancellor thought that it was an order of course, in the instance, to which the Register agreed; but the next day Lord *Chancellor* mentioned it again, and said the motion was regular, and finally made, and ordered a sequestration *nisi*.

ATTORNEY-GENERAL v. The EARL of WINCHELSEA and Others (a).

Rolls,
30th November.

The information stated (*inter alia*) that the reverend *Robert Chapman*, late vicar of *Ravenstone*, deceased, by his will, 7th September, 1783, gave and bequeathed the residue and remainder of his personal estate in the words following: "I give

Where a residue is left to charitable purposes, and it turns out to be more than adequate to the number of the objects, the whole must be applied to similar

the real name of this case, and which it is reported, 2 Cox, 364, *Attorney-General v. Hurst*, Reg.

Lib. A. 1790. fol. 554. and A. 1791. fol. 487, the Earl having died before the hearing.

purposes.—Mortgages cannot pass to a charity, though included in a general residue.

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" and

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“ and bequeath all the rest, residue, and remainder of my goods,
 “ chattels, personal estate, and effects whatsoever and whereso-
 “ ever, not hereinbefore otherwise disposed of, unto the Right
 “ Honourable the Earl of *Winchelsea* and *Nottingham*, *Thomas*
 “ *Hanmer*, Esq. *G. Wright*, Esq. and the Reverend *Robert Daw-*
 “ *biggin*, rector of *Stoke Goldington*, in the county of *Bucks*, and
 “ the vicar of *Ravenstone* for the time being, their executors, admi-
 “ nistrators, successors, and assigns, upon trust, that they the said
 “ Earl of *Winchelsea*, *Thomas Hanmer*, *G. Wright*, *Robert Dawbig-*
 “ *gin*, and the vicar of *Ravenstone* aforesaid for the time being, or the
 “ survivors of them, do and shall, with all convenient speed after
 “ my decease, put, place out, invest, and continue at interest, in
 “ their joint names, in the public funds, or parliamentary security,
 “ and not on any real security whatsoever, all and singular the
 “ residue of my said personal estate; and do and shall, from time
 “ to time, for ever afterwards, pay, apply, and dispose of the
 “ yearly income, dividends, interest, and produce of the said re-
 “ sidue of my personal estate, upon the trusts, and to and for the
 “ uses, intents, and purposes hereinafter mentioned, (that is to
 “ say) that they my said trustees, or the survivors of them, and
 “ their successors, do and shall, yearly and every year, for ever
 “ afterwards, out of the said dividends, interest, and produce of
 “ the said residue of my personal estate, pay, or cause to be paid,
 “ by even and equal half yearly payments, (to wit) at the feasts of
 “ the Annunciation of the Blessed Virgin *Mary*, and *St. Michael*
 “ the Archangel, in every year, unto a proper schoolmaster, for the
 “ time being, (to be nominated and appointed by my said trustees,
 “ or the major part of them, or their successors) the sum of £12,
 “ clear of all taxes, charges, and deductions, the first payment of
 “ which to be made upon such of the said days as shall first and
 “ next happen after the placing of the said residue of my said
 “ personal estate out at interest as aforesaid, for the teaching and
 “ instructing all and singular the children of *Ravenstone* aforesaid,
 “ for the time being, to read, write, cast accounts, and say their
 “ catechism, at some proper convenient place in *Ravenstone* afore-
 “ said, which I earnestly recommend to the said Earl of *Winchel-*
 “ *sea* to appoint for that purpose, not doubting his inclination to
 “ do any thing in his power to further my intentions in this matter:
 “ and also that they, my said trustees, or the survivors of them,
 “ or their successors, do and shall, yearly and every year, out of
 “ the said dividends, interest, profit and proceeds of the said re-
 “ sidue of my said personal estate, lay out and expend the sum of
 “ twenty shillings in the purchase of such books as they shall think
 “ proper for the use of the children of the said school; and also
 “ that they, my said trustees, or the survivors of them, or their
 “ successors, shall yearly and for every year, for ever, apply the
 “ surplus of the said dividends, interest, profit, and proceeds of
 “ the said residue of my said personal estate, (if any there shall
 “ be,

“ *be*, after such payment as aforesaid) in the *cloathing and putting*
 “ *out apprentices to any trade, business, or occupation* that shall
 “ be thought proper for them, *two children* of the parish of *Ra-*
 “ *venstone* aforesaid, and *one child* of the parish of *Little Wool-*
 “ *stone* aforesaid: and he directed that his said trustees, or the
 “ major part of them, should meet at least once a year at *Raven-*
 “ *stone* aforesaid, and inspect into the management of the said
 “ school, and settle and audit the accounts of the said charity;
 “ and appointed the defendants, *H. Dering*, and *G. Pitt Hurst*,
 “ executors of his will.”

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 ATTORNEY-  
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 v.  
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 Winchelsea.

The testator died the 15th of *October*, 1785, possessed of a considerable personal estate, without leaving any wife or children, or any other next of kin than the defendant, *Mrs. Chapman*, his only surviving sister, and defendant *Richard Daniel*, his nephew, him surviving.

The information prayed that the charitable bequests might be established; and that, after taking the usual account of testator's assets, the residue or clear surplus of the personal estate and effects might be ascertained and paid to the defendants the trustees, to be by them invested and placed out at interest upon government securities, in their names; and that the dividends, or annual income thereof might be from time to time for ever applied for the charitable purposes mentioned in the testator's will; and in case it should appear that such dividends or annual income should be more than sufficient to pay the annual allowance of £12 to a schoolmaster, and the yearly sum of 20s. for the purchase of books for the use of the said school, and the expences of cloathing and providing apprentice fees for such three boys as aforesaid every year, then that the aforesaid charity might be extended and enlarged in such manner as the Court might think proper, and that the whole of the interest or annual income of the *whole residue and clear surplus* of the said testator's personal estate and effects might be applied according to the directions of the testator's will, or as near thereto as the nature of the case and the circumstances would admit of.

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The defendant, *Richard Daniel*, one of the next of kin, insisted that the surplus of the testator's estate and effects was much more than sufficient to answer all the charitable purposes, and that a considerable part of the residue consisted of *mortgages*, or some other real securities; and that so far as the gift or disposition of the said residue related to such securities the same ought to be declared void; and submitted whether, as one of the next of kin, he was not entitled to a distributive share of such residue.

The defendant, *Mrs. Chapman*, the other next of kin, *disclaimed* having any interest in the residue, being desirous that the charitable bequests should be established.

The executors admitted that the residue of the personal estate was of a considerable amount, and that a part thereof consisted of

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two mortgage securities, viz. £200 which had been paid in since the testator's death, and £2,000 still outstanding.

The trustees submitted, that as there was much more than sufficient to answer the precise number of objects specified in the will, the charity ought to be extended.

The cause came on to be heard the 29th of June, 1790, when it was referred to the Master, to take the usual accounts, and to state what the testator's personal estate consisted of.

Subsequent to the decree, and previous to the Master's report, the defendant, Mrs. Chapman, assigned all her interest in the mortgages, and the residue of the testator's estate, to the trustees, for the benefit of the charity.

In consequence of such assignment a supplemental information was filed, and the cause came on again the 30th of November, 1791.

Two questions were made: 1st. Whether the bequest of the residue, so far as it related to the real securities, was not void, as being within the statute of Mortmain:

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2dly. Whether the surplus, beyond what was sufficient to answer the charitable purposes of the testator, should not go to the next of kin, or whether the court should not consider the whole as disposed of by the testator, from the next of kin, and be at liberty to extend the charity, by enlarging the number of objects.

Mr. Selwyn and Mr. Stanley, in support of the information contended, that however the bequest, so far as it related to the *real securities* comprised in the residue, might be void, yet, in order to support the intention of the testator, and to effectuate the charitable bequest as much as possible, the Court, as in former instances, ought to *marshal or arrange the testator's assets*, that there is a distinction between a specific bequest of a *mortgage security*, and a residue including such a security, that in the latter the Court has been favourably inclined in support of the charity, and has accordingly directed an equitable arrangement of the assets. *Attorney-General v. Graves*, Amb. 155. As to the meaning of real security, they cited the *Attorney-General v. Bowles*, 2 Ves. 547.

2dly. As to the surplus, it was insisted, that the *whole residue* was meant and intended to be disposed of by the testator in charitable purposes, that the number of the objects might be increased under the directions of the Court, as in *Attorney-General v. Johnson*, Amb. 190. *Attorney-General v. Sparks*, *ibid.* 201. the Court will give effect to the whole bequest. *Attorney-General v. Hoare*, cited in *Attorney-General v. Green*, (ante, vol. ii. p. 495.) If the property increases, the number of objects may be increased, and the whole applied. In *Thetford School*, 8 Co. 130. 2 Vern. 397. the charities were augmented in proportion to the improved value of the estate.

Mr.



*Mitford* and Mr. *Richards*, for the next of kin, insisted that such part of the residue as consisted of the mortgage security should not take effect. *Attorney-General v. Martin*, which first took place on the 6th *March*, 1769, and was heard at the *Rolls*. "Mrs. *Martin*, by her will, gave all the residue of her monies, government securities, household goods, and other personal estates whatsoever, after payment of her debts and legacies, to her executors, upon trust, to dispose thereof for such charities as they or the survivors of them should think proper, and then gave, by her will and codicil, several legacies." An information was given for an account of the personal estate, and the application of the residue to charitable purposes. The next of kin disputed the validity of the residue, and it was insisted that part of it consisted of real securities. The usual account was directed, and it was ordered by the decree, that the Master should particularly state, in any, and what part of the testator's personal estate was comprised in any, and what securities. The cause came on again on the 11th *March*, 1776, when it was declared, that such part of the personal estate as arose from mortgages, or other real securities specifically bequeathed, was applicable to the payment of debts and legacies, except those given to the charities, and that the residue, consisting of the other parts of the personal estate, should be applied to the charitable purposes, according to the will, &c. The cause was appealed from to the present Chancellor, who reversed the decree, refusing to marshal the assets, and declared that the residue belonged to the next of kin, after deducting a certain sum for costs. So in *Middleton v. Spicer*, 11th *November*, 1776, no difference whether a particular or general bequest of the personal estate, part of which consisted of money due upon mortgage and real security.

As to the surplus, they insisted that, as there was much more than sufficient to answer the charitable purposes, the residue, after the charities were provided for, must fall to the next of kin, although the Court has, in former instances, as in the above cited cases of the *Attorney-General v. Johnson*, *Attorney-General v. Green*, and the *Attorney-General v. Green*, augmented the charitable objects as the income of the estates has increased, yet it does not extend the charities further than the testator has intended where the information is for a new establishment, as upon the present occasion. The true question here is, whether the testator meant to dispose of the whole of his personal estate, supposing the fund to be more than sufficient for the charitable purposes, or whether it shall not go to the next of kin. So in the case of *Attorney-General v. Bishop of Oxford*, (ante, vol. i. p. 444. n.) the next of kin insisted upon the surplus beyond what might be sufficient to build the church.

As to the charity for putting out apprentices, suppose the fund amounted to £100,000, or any very considerable sum, the Court

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Court would not be at liberty to expend the whole of that fund in apprentice fees: it must then go to the next of kin: it is tantamount to say, "I give so much out of the *residue* as will be sufficient for such charitable purposes." In such a case the fund cannot be applied *cy pres*: if too large, the surplus *ultra* the application of the testator's express bounty must fall to the next of kin. As to the doctrine of *cy pres*, that can only take place where the whole fund is absolutely given away from the next of kin, and even then the Court does not readily adopt it; it was rejected in the *Attorney-General v. Bishop of Oxford*, for in that case the Court would not comply with the offer of the Bishop to repair; the intent must be complied with *in toto*, or not at all. The testator there meant to *build* and not *repair*: a new church was the object of the testator's intention.

The Court should refer it to the Master, to state what the surplus is, before the point is decided as to the application of it.

*Master of the Rolls.*—The question is, whether the whole surplus of this personal estate is not intended to go to the charitable purposes mentioned in the will, though more than sufficient to answer the exact number of objects there specified. The real intention of the testator is *perfectly clear*, that he meant to give the *whole surplus*. It has been said, that the distinction is, that where there is a definite object, and that cannot take place, the Court will not look for another object, but let the property go to the next of kin, or the heir at law; as in the *Attorney-General v. Bishop of Oxford*, the only object the testator had in view was the *building a church*, or in fact, creating a pillar of vanity, that was his sole idea, and *nothing short* of that could answer his intention, and therefore the object must be effectuated *in toto*, or the property fall to the next of kin. So in the *Attorney-General v. Goulding*, (ante, vol. ii. p. 428.) where Mr. Justice Buller seems to have gone to a great extent (a), and as far as the case would well warrant him, it was held that the testator had no *general intention* beyond that specified in his will, and consequently that the bequest must be confined to the precise object, and not beyond it; but wherever the intention has been *to dispose of the whole property* to certain purposes, as in the early case of *Thetford School*, and numerous subsequent authorities, the whole has been applied: the intention has been considered as such, and it has been only inferred that the testator has been mistaken merely as to the *quantum*. It has been observed, as a strong mark of his intention, that by giving the apprentice fees to three objects he has marked out the limits of his bounty, and that the confining it to that number will be a sufficient compliance with his intention; but, according to the disposition of this residue, his intention could not be limited to

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(a) See the observations upon this in *Chapman v. Brown*, 6 Ves. 410.

three boys, and if it would pay more, the testator has shewn an intent that the surplus beyond that must be applied in the same manner; therefore I am of opinion it must be applied to the charitable purposes mentioned in the will: perhaps it may not turn out to be much more than sufficient, but if it should, the next of kin may then come to the Court, as in other cases, where there has been an increase of rents and profits.

As to the point of the mortgage securities being comprised in the residue, whether they shall pass, or rateably bear the burthen imposed upon the personal estate, there is a direct authority in point, of the *Attorney-General v. Caldwell*, (Amb. 635.) where it is taken for granted they shall not pass, either as an absolute gift, or as included in a residue, but that the Court will throw the whole burthen upon *that part* of which the charity cannot avail itself. In the *Attorney-General v. Meyrick*, 2 Ves. 44. a direct gift of a mortgage was held void, and as to the residue, I cannot recognize the distinction which has been attempted to be laid down between a specific gift of a mortgage, and where it is comprised in the residue; in both instances it is an interest in land; and nothing, that in the least degree partakes of *realty*, can now pass under the statute of *Mortmain*. *Middleton v. Spicer*, perfectly coincides with my opinion. A charity cannot take such an interest either directly or indirectly, but it must go in favour of the parties legally intitled to the benefit of it.

In the original cause.—Declare that the debts, legacies, and costs of the original suit (except so far as such costs relate to any proceedings to be had respecting the charities in question, under the direction hereinafter given for regulating the same) ought to be paid out of the testator's general personal estate, and out of the monies secured upon mortgage, or other real securities, *pro rata* (a):

Declare, that the surplus of the personal estate, exclusive of such part thereof as shall appear to have been secured by mortgage (after payment of part of the debts, &c. before mentioned) be applied for the several charitable purposes mentioned in the testator's will, and the surplus be retained by or paid to the trustees, for the several charitable intents and purposes therein mentioned, and that a scheme be laid before the Master for the application of the charitable funds given by the will:

(a) The rule laid down in the present case, as to the application of the respective funds to the debts and other charges, according to the proportion those funds bear to each other, has always been followed since. *Howse v. Chapman*, 4 Ves. 542. *Paice v. The Archbishop of Canterbury*, 14 Ves. 373. *Curtis v. Hutton*, ib. 540. That the court will not marshal assets in favour

of a charity, vide *The Attorney-General v. Tyndall*, 2 Eden, 207. *Ridges v. Morrison*, 1 Cox, 180. *Makeham v. Hooper*, post, vol. iv. 153. Upon the *cy pres* doctrine, vide *Moggridge v. Thackwell*, post, 517; and as to building upon land already in mortmain, see the Editor's note to *Attorney-General v. Tyndall*, cit. sup. and the *Attorney-General v. Nash*, post, 558.

Declare,

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Declare, that one moiety of so much of the personal estate as shall have arisen from mortgages or any other real securities, (after payment of debts) doth belong to *R. Daniel*, one of the next of kin, and the same to be paid to him accordingly, and the other moiety to the other defendant *Elizabeth Chapman*, as the representative of the other next of kin; and as to the supplemental bill, declare, that the deed of trust, of the 10th of *December*, 1790, ought to be established and carried into execution, and all parties paid their costs, and that such part of the testator's estate as would have belonged, according to the declaration made in the original cause, to *Elizabeth Chapman*, must be applied to the charitable purposes mentioned in the testator's will, and that the same ought to be paid to or claimed by the defendants, the trustees for such purposes, and all parties to apply to the Court as occasion may require.

Rolls,  
1st December.

LEE v. PRIEAUX.

Legacy to a feme covert, "her receipt to be a sufficient discharge to the executors," is equivalent with saying, "to her sole and separate use."


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THE petition of *Sophia Lee*, the wife of *Richard Lee*, a bankrupt, prayed, that the sum of £296. 9s. cash in the Bank, standing in the name of the Accountant-General, being the interest and dividends of £1,221. 6s. Bank Stock, which had accrued since the death of *Jemima Wilson* (formerly *Price*), might be paid to the petitioner, to and for her own separate use and benefit, independent of her husband, the plaintiff in the cause; and that the future interest and dividends to accrue, due on the said £1,221. 6s. Bank Stock, might be paid to the petitioner for and during her life, and for her own separate use and benefit, pursuant to the will of *Catharine Price* the younger.

It stated (*inter alia*) the clause in the will of *Catharine Price* the younger, deceased (upon which the question arose), dated 12th May, 1782, in the words following: "Whereas I am, upon the death of *Jemima Price*, widow of my late uncle, *R. Price*, deceased, entitled to £1,221. 6s. Bank Stock, now standing in the name of the Accountant-General, in trust, in the cause of *Price* and others v. *Bedford* and others; now I do hereby give and bequeath unto *E. Prieaux*, her executors and administrators, all the said Bank Stock, and all my right, title, and interest to and in the same, in trust, that she the said *E. Prieaux*, her executors, &c. do and shall regularly pay out of the yearly interest and dividends of such Bank Stock unto *Ann Hill*, widow, a clear annuity of £10, by equal half-yearly payments, during the life of the said *Ann Hill*; and further, my will and intention is, that my said trustee, her executors, &c. do pay

" unto

“ unto *Sophia Lee* all the overplus of the yearly interest and dividends of the said Bank Stock; and after the death of the said *Ann Hill*, my will is, that the said annuity of £10 a-year do cease, and that the whole yearly dividends of the said Bank Stock be then paid to the said *Sophia Lee* during her life, and that my said trustee, her executors, &c. *shall not be troubled to see to the application of any sum or sums paid to the said Ann Hill and Sophia Lee, but their receipts in writing respectively shall be a sufficient discharge to my said trustee, her executors, &c. for the sum or sums so to be paid as aforesaid; and from and immediately after the death of Sophia Lee, I give the said £1,221. 6s. to such the children of Sophia Lee as shall then be living, to be divided between them, share and share alike, and she appointed E. Prieaux sole executrix.*”

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When the petition first came on, his Honour ordered it to stand over, that the assignees of *Richard Lee*, the bankrupt, might appear.

*Master of the Rolls.*—When this petition first came on, it was considered as a matter of course, and that although the words, “ notwithstanding her coverture,” were omitted, and no notice of the coverture, so as to bar the husband, yet that the other expression was sufficient to entitle the wife to this money.

Having entertained some doubts about it, I ordered the petition to stand over for the assignees of the husband (he being a bankrupt, to make their claim.

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Upon the part of the petitioner, it was argued, that it was competent to give a married woman the same absolute interest in *personal property* as she might have had if a *feme sole*. The first case upon the subject is *Harvey v. Harvey*, 1 P. W. 127; and there Lord Chancellor *Cowper* entertained a doubt whether a married woman, though she might be competent, could take such a separate interest without the intervention of trustees, and whether the legal estate devolving upon the husband, the Court could make him a trustee for the wife. But in *Bennet v. Davies*, 2 P. W. 316, that doubt was done away. Another case was cited by Mr. Selwyn, *Woodman v. Horsley*, MS. 11th February, 1783, there the words were, “ the wife’s receipt shall be a sufficient discharge, notwithstanding her coverture,” and, though late in the day, a question was made as to the operation of those words; the bill was brought by the assignees and dismissed, but without costs, as Lord *Cowper* had entertained some doubts upon the point in *Harvey v. Harvey*, and the bill had been filed upon the mistaken opinion of counsel.

The only question now is, whether the words in this will are sufficient to shew that the testator meant to give an absolute power to the wife, independent of the husband, to receive the money; for it was argued, that it is incumbent upon the petitioner’s

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tioner's counsel to satisfy the Court that such was the intent. There is no case in which words of this sort have been decided upon one way or the other. As to *Darley v. Darley*, 3 Atk. 399, the decision was directly the reverse. The date of the decree is *December 6th, 1746*, Reg. Lib. A. p. 263.; the cause was heard upon the original and supplemental bills, the latter of which charges, "that the plaintiff's father was a man of no substance, and incapable of maintaining himself, which made the plaintiff's grandfather averse to the match, but he afterwards consented, upon the plaintiff's father assuring him that he would not intermeddle with any part of the estate or effects he should, after the marriage, think fit to convey, but that the wife should have the sole power of disposing thereof by will, or any other mode of appointment: that the plaintiff's grandfather being possessed of the term of one thousand years in certain premises in the bill mentioned, did by indenture, dated 30th *October, 1708*, made between himself and *plaintiff's mother*, though a feme covert, in consideration of natural love and affection, and her *livelihood* and future support, assign a moiety of such term to the mother, her executors, &c. to hold from his decease. Upon the death of the grandfather the plaintiff's father had acknowledged that he had given the mother power to make a will, and particularly that the father had by an instrument in writing, 22d *April, 1711*, promised to pay £200 to such person as she should by will appoint, and upon 1st *August, 1715*, he had also given her a power to devise £1,000 as she might think fit, and had subjected himself to pay the same; upon the 26th *June, 1738*, the mother made her will, and gave, in pursuance of *her power*, to the plaintiff, the moiety of the *aforesaid term*, and the respective sums of £200 and £1,000. That the plaintiff delivered the will to the defendant, *J. Darley*, to shew to his father, which he did, and that the father, having considered the said provision as quite sufficient, left the plaintiff only 1 s. In a bill filed against the father in his life-time, the father had admitted by his answer, that he had been informed that the mother had made such a will, but submitted whether she had a power to do so without his consent, but it did appear that he had made some agreement that she should have a separate estate. The son, *J. Darley*, by his answer, afterwards insisted that there never was any formal power delegated to her by the father, except by letter in the year 1715, and that if such letter was to be considered as giving her such a power with respect to the £200 and £1,000, that the same ought not to be executed, as the father, subsequent thereto, executed a bond in full discharge, by way of defeazance of any such instrument, and completely annulled the other power. By the decree, the original and supplemental bills, as far as the same related to the moiety of the term mentioned in the paper 22d *April, 1715*, and the £1,000, in the letter of the 9th *August,*



August, 1715, and the £200 in the instrument of 22d April, 1715, were dismissed.

Such a case, had it been correctly stated in *Atkyns*, might have deserved consideration, but as it stands, is of no authority; and therefore, without resorting to cases, the point must solely depend upon the construction of the words used by this testatrix, and whether they are competent to give the petitioner a separate interest in this money: Upon the most mature consideration, I am of opinion that they are sufficient for that purpose. The law undoubtedly gives all to the husband, unless something is done to prevent it from so doing.

In this case, two women were the objects of the testatrix's bounty, the one a widow, the other a married woman; and with respect to the widow, she might have used these words as a caution against any future husband having a right to the money; and as it has been contended, these words must have their meaning; and without giving them such a one as has been insisted upon in favour of the petitioner, they would be mere surplusage.

The testatrix might probably insert these words, "her receipt should be a sufficient discharge,"—in consideration of the petitioner being a married woman, and the party was in that situation, that she could not otherwise have been authorized so to do: if these words have not that meaning, she might as well have omitted them. Therefore I am of opinion, that there is a clear intent to be collected from the words of this clause, that the testatrix meant that Mrs. Lee, though a married woman, should have the power to give a discharge, so as to bar her husband.

The assignees must have insisted that the words could not have had the effect intended by them; and as to the argument, it is going out of the will, as the party was certainly capable of being made a *feme sole*; and though the testator has not by the former words of the gift put her into that situation, yet by the latter clause she has controverted the law, by words tantamount to saying, Whether under *coverture* or otherwise, her receipt shall be a sufficient discharge.

No assignments could have been made; for how could the wife, with any propriety, have given her discharge to the assignees (a)?

(a) The doctrine as to what expressions will be holden sufficient to constitute a trust of property for the separate use of a *feme covert*, are well collected and arranged by Mr. Clancey, Tr. 41. In *Dixon v. Olmuis*, 2 Cox, 414, a bequest to a married woman, "whenever she shall demand or require the same." In *Hartley v. Hurle*, 5 Ves.

545, a bequest in trust "to pay the annual produce into her proper hands." In *Adamson v. Armitage*, Coop. Ch. Rep. 283, a legacy to be vested in trustees, "the income arising therefrom to be for her sole use and benefit." In *Ex parte Wray*, 1 Mad. Rep. 199, a settlement "for her own use and benefit," have all been construed gifts to her

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her separate use; and in *Johnes v. Lockhart*, cited 5 Ves. 520. and 1 Mad. Rep. 207. the same construction was put upon a disposition to a wife for her own use. But a mere bequest to her for life, will not have that effect, *Brown v. Clark*, 3 Ves. 166. *Lamb v.*

*Milnes*, 5 Ves. 517. *Jacobs v. Amyatt*, 1 Mad. Rep. 376, n. As to the doctrine of a Court of equity in holding the husband a trustee for the wife, vide *Rich v. Cockel*, 9 Ves. 369. *Parker v. Brooke*, ib. 583.

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Lincoln's-Inn  
Hall, 6th Dec.

## BOND v. The Duke of NEWCASTLE.

Where defendants are beyond the jurisdiction of the Court, service of the subpoena on their clerk in court cannot be allowed to be deemed good service, though they have by that clerk in court filed a bill relative to the same subject.

**M**R. Cox moved, that under the circumstances of this case, service of the subpoena in this cause, upon the clerk in court for the plaintiffs in the cause of *St. George* against the Duke of *Newcastle*, might be deemed good service, the defendants being still out of the jurisdiction of the court.

By an act of the 30 Geo. 3. c. 24. intituled, "An act for giving relief to such persons as have suffered in their rights and properties, during the late unhappy dissensions in *America*," the commissioners for *American* claims, were to make up books of the names of the persons whose claims were allowed, with the sums allowed set opposite to each name, and the lords of the treasury were to direct their warrants to the auditor of the receipt of the exchequer, to make out standing orders in the names of the persons inserted in such books, for the sums to which they should be so entitled, to be signed by three lords of the treasury, and to be irrevocable; and which orders were to bear an interest of £3. 10s. from *July 5*, 1788, and were to be chargeable upon certain supplies, and which orders were to be assignable by indorsement; and in order to prevent such orders from being fraudulently obtained from the auditor of the exchequer, the commissioners were to make out *certificates* to the persons named in the books, containing the names and addition of the claimants, and the sum to which he or she should be entitled, which certificates should be carried to the proper officer in the office of the auditor of the exchequer, who, upon receiving it, should deliver out the order for the benefit of such person. The sale of such certificates had been very common, and it had become usual for the holders of them to assign them, and the assignments were from time to time registered in the auditor's office; and in consequence of the frequency of such assignments, printed copies of the assignments, with blanks to be filled up, were kept in the office, and were filled up by the clerks, as occasion offered, upon payment of a fee of one guinea; and such certificates were sold at the stock exchange at stated market prices, in the same manner as exchequer bills. The plaintiff stated himself to be a broker, unconnected with defendant *Hamilton St. George*; and to have purchased,

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on the 19th July, 1790, at the stock exchange, from *William Edwards*, another broker, as the agent of *William Linberry Grovenor*, to whom the defendant *Hamilton Usher St. George* had assigned it, a certificate made out in the name of the defendant *Hamilton Usher St. George* for the sum of £1,122. 10s. and paid the said *Edwards* such sum of £1,122. 10s. for the same, and that he purchased the same without notice that the defendant *St. George* had not full power to sell the same, or that he had executed any deed, whereby he had settled the same upon or to the use of his wife, the defendant *Marianne St. George*, but hearing that the orders on such certificates were in the course of delivery in the auditor's office in the Exchequer, he, in consequence thereof, upon production of such certificates, applied there to have the orders for payment of the said sum delivered to him, as assignee of the defendant *Hamilton St. George*, where he was informed, that a bill had been filed by the defendant *Marianne St. George*, and her trustees, in this Court, making a claim on the orders, which were therefore refused to be parted with till such bill was disposed of; and contended, that having purchased the certificates in market overt, and at a fair market price, he considered himself as a purchaser thereof for a valuable consideration, without notice of the claim of defendant *Marianne St. George*, or her trustees.

Mr. *Hamilton St. George* having made this certificate the subject of a settlement after marriage, on his wife, *Marianne St. George*, by virtue of which she was to be entitled to half the money on the contingency of her surviving him, subject to one half of his debts, a bill had been filed in *Trin.* 1790, by *Marianne St. George*, and her trustees, against the Duke of *Newcastle*, praying that a receiver might be appointed to receive the orders therein mentioned, and also the money that would be payable thereon, and that the Duke of *Newcastle* might be restrained, by injunction, from delivering out the said orders for payment of the sums payable upon such orders, and that the defendant *Hamilton St. George* might be restrained from receiving the same, and injunctions had been obtained accordingly, which was the bill referred to, and the reason of the refusal to deliver the orders to the defendant.

The defendant *Hamilton St. George* resides in the province of *Virginia*, and the defendant *Marianne St. George*, and her trustees, in *Scotland*, out of the jurisdiction of this Court.

These facts were verified by affidavits, and the motion was, that the service of the *subpœna* on the clerk in court by whom they had filed their bill, might be good service upon them.

But Lord Chancellor thought, though this was a case of peculiar hardship, that it could not be allowed, and therefore

*Refused the motion (a).*

(a) The cases upon this subject are collected in the note to *Anderson v. Lewis*, post, 429, and as to service in

cases of injunction, in the note to *Burke v. Vickers*, ante, 24.

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1 Ves. jun. 402.

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Plea of the stat.  
of *Frauds* allow-  
ed, where a  
written agree-  
ment was essen-  
tially varied by  
parol.

(a) JORDAN and Others v. SAWKINS.

**T**HE bill stated that, *Sawkins*, the defendant, in the month of *March* last, and in consideration of £300, agreed to grant *Mills*, one of the plaintiffs, a lease of a public house, known by the sign of *The Robin Hood*, in *High Holborn*, for twenty-one years, to commence from the 21st of *April* following at a rent of £40, and that *Mills* paid £10 in part performance, a receipt for which, expressing the contract, was signed by the defendant: that *Mills* was concerned in the transaction, not on his own account, but as agent for the other plaintiffs, *Jordan* and *Newnham*, and it was shortly after agreed, between the plaintiffs and defendant, that the lease should commence on the 24th of *June*, in the present year, 1791, instead of the 21st of *April*, and that the same should be made to plaintiffs *Jordan* and *Newnham*, instead of the plaintiff *Mills*.

A lease was accordingly prepared agreeable to this last agreement, and tendered to the defendant to execute, and the plaintiffs *Jordan* and *Newnham* offered to pay the remainder of the sum of £300, when the defendant refused; upon which this bill was filed for a specific performance of the agreement.

To this bill, the defendant pleaded the statute of *Frauds*, to the discovery and relief, as to so much as respected the latter agreement, and as to so much as related to the written agreement, he answered, that it was obtained from him at an undervalue, and whilst he was in a state of intoxication.

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Mr. *Lloyd* and Mr. *Abbot* for the defendant (who set down the plea to be argued) contended—that the plea was right both in form and substance: that if the second agreement stood alone, being merely a parol agreement, the plea would be a good bar to the relief; and it is equally so, though the second agreement, which is by parol only, refers to the former right which is in writing. The relation of the second to the former is the only circumstance that can cause any difficulty; but it must relate to the former, either as differing from it, or making part of it: and it is essentially different from it; for though the subject-matter of the agreement remains the same, yet the parties are changed by the substitution of *Jordan* and *Newnham* in the place of *Mills*, and the conditions are changed by varying the time of the commencement of the lease, both which are essential variations from the original written agreement. A parol variation of a written agreement cannot be enforced in equity, *Cokes v. Mascall*, 2 Vern. 34, where the subject-matter continued the same, and the parties also, but the defendant

(a) Reg. Lib. A. 1790. fol. 72.

relying

relying on the statute of *Frauds*, the Court refused to decree a specific performance, the contract not being binding in equity. The suffering the plaintiff, in that case, to try his right at law, was no acknowledgment of his title to relief, as the construction of the statute of *Frauds* is the same at law as in this Court; and if there is no relief either in law or equity, no discovery will be enforced; consequently a plea to both is good.

Then, if it is considered as a part of the former agreement, it is a part not expressed, and bad, so far. An addition by parol to a written agreement, cannot be helped in equity. The rule is so laid down in Comyn's Digest, tit. *Chancery* (2 C. 4.) and *Foot v. Salway*, 2 Cha. Ca. 142. So in *Brodie v. St. Paul*, in this Court, 31st May last (a). Therefore the plea is good, both to the relief and discovery sought by the bill as to the latter agreement.

Mr. Solicitor-General and Mr. Stanley for the plaintiff.—The difference made by the parol from the written agreement, that the lease should be to different parties, is not essential; because *Mills* might have declared himself a trustee for *Jordan* and *Newnham*, if he so pleased. The whole agreement might have been waived by parol: why therefore should it not be varied? *Brodie v. St. Paul* is not like this case; there the agreement was held void, because it was uncertain what covenants were read, and the reasonableness of them was referred to the opinion of a third person, so that the whole was uncertain.

*Cokes v. Mascall* does not apply, for it appears by the report of the case, 2 Vern. 200, that the agreement there was afterwards decreed to be performed.

Lord Chancellor.—As to the form of the plea, it is the common form, being a plea *pro tanto* to the parol agreement. The different period of commencing the lease makes a material variation, as it gives the estate from the owner for so many months longer.

*Plea allowed (b).*

(a) 1 Ves. jun. 326.

(b) The plaintiffs afterwards amended their bill, and the cause coming on before the Lords Commissioners, a performance was decreed, with a variation, that it was to be at a clear rent of £20, without deducting land-tax; but on its afterwards coming on before Lord Rosslyn, he reversed the order, and dismissed the bill, post, vol. iv. 477. That determination, as observed by Lord Eldon, (7 Ves. 133.) was not because the Court cannot specifically perform an agreement with a variation: if legally agreed for, it is

part of the agreement, if not legally agreed for, it is no variation. All the Court meant to say was, that an addition to a written agreement by parol, would not vary the written agreement. The doctrine is well established in *Rich v. Jackson*, post, vol. iv. 518. *Brodie v. St. Paul*, 1 Ves. jun. 326. *Clinan v. Cooke*, 1 Sch. & Lef. 39. Sugd. Vend. & Purch. 125. et seq.

In the note to the above noticed case of *Rich v. Jackson*, the Editor has collected numerous instances, in which parol evidence of fraud, mistake, or accident, has been admitted in favour of

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of a defendant, to resist a specific performance of a contract for lands. It appears to be established however, by several decisions, that such evidence cannot be admitted for a plaintiff to establish an agreement. This doctrine is founded on the words of the statute of Frauds, that "no person shall be charged, &c." the case of the defendant therefore, it is said, is left as it was before the statute, and he may shew that the agreement, which seeks to charge him, is not the one he signed, as the statute does not say that a written agreement shall bind, but that an unwritten agreement shall not bind, *Marquess of Townsend v. Stangroom*, 6 Ves. 528. *Clinan v. Cooke*, cit. sup. *Woollam v. Hearn*, 7 Ves. 211. *Clarke v. Grant*, 14 Ves. 519. *Higginson v. Clowes*, 15 Ves. 516. *Lord W. Gordon v. Marquess of Hertford*, 2 Mad. Rep. 120.

There is some authority certainly against this doctrine, but the preponderance is so much in its favour, that it may be considered as fully established. In *Pember v. Mathers*, ante, vol. i. 54, Lord Thurlow admitted evidence on the part of the plaintiff, to establish a parol undertaking by the defendants to indemnify, and there being a doubt as to the sufficiency of the evidence his Lordship directed an issue, which being found against the defendants, the plaintiff had a decree for a specific performance. There are also two dicta to that effect, by Lord Hardwicke, the one in *Walker v. Walker*, 3 Atk. 98, the other in *Joynes v. Statham*, 3 Atk. 388. They are both examined, and their force considerably diminished by Lord Redesdale, in *Clinan v. Cooke*, cit. sup. and Sir W. Grant, in *Woollam v. Hearn*, vide also Sugd. Vend. & Purch. 125.

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Hall, 10th Dec.

Costs.

## BENNET COLLEGE v. CAREY (a).

THIS was a bill for a specific performance of a contract for the purchase of an estate; £800 had been paid as a deposit. It appeared the defendant could not make a title. It was agreed, that the bill must be dismissed. Mr. Lloyd pressed Lord Chancellor to order the deposit to be returned; but his Lordship said, he could make no order upon a bill that was dismissed, for that would be decreeing relief.

His Lordship proposed dismissing the bill with costs, and Mr. Solicitor-General objecting to this, that the costs ought to follow the event of the suit, Lord Chancellor said they were completely in the discretion of the Court.

But the College being desirous of having the purchase completed, if possible, it was referred to the Master to enquire, whether the defendant could make a title (b).

(a) Vide Sugd. Vend. & Purch. 40. 189. 431.

(b) Reg. Lib. A. 1791. fol. 63. nom. *Corpus Christi College v. Cary*. It came on as a rehearing from a decree direct-

ing the contract to be delivered up to the plaintiffs to be cancelled. Costs to the defendants. It was now referred to the Master, &c.

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1 Ves. jun. 405.

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## HILL v. CHAPMAN.

**T**HE testator, *John Spackman*, made his will, dated 15th January, 1785, and thereby gave the residue to his trustees, the defendants, "in trust for the benefit of all his grand-children, " by his daughter *Sarah*, equally to be divided between them, and " laid out for their respective benefit." The testator made two codicils to his will, and by the latter, dated 19th November, 1785, he gave annuities to his servants to the amount of £30 a year, and directed £1,000 three *per cent.* Bank annuities, to be set apart to pay these annuities.

The plaintiffs were the children of the testator's daughter *Sarah Hill*, born before the death of the testator.

The defendants were the trustees, and a child born after the death of the testator, (but during the life of the annuitants) who was brought before the Court, by a supplemental bill.

And the question was, whether the after-born child should take a share of this £1,000.

Mr. *Mitford* and Mr. *Cooke*, for the after-born child.—Where a legacy is given to the children of *A.* it is, in general, intended children living at the death of the testator, *unless there are words in the will, or circumstances to postpone the distribution*; but when the fund is given to one for life, the words that would otherwise apply to the death of the testator, will apply to the death of the tenant for life, and will let in the children *born before that event.* *Ellison v. Airey*, 1 Ves. 111. *Attorney-General v. Crispin* (ante, vol. i. p. 386.) So where any thing postpones the distribution, *Congreve v. Congreve*, (ante, vol. i. p. 530.) where the division was to be at the age of twenty-one, a child born before the eldest attained twenty-one, was let in. Here the £1,000 given by the codicil, is to secure annuities, and of course cannot be distributed till the annuitants are dead, and therefore must be distributed among the children born before that period.

Mr. *Mansfield*, for the plaintiffs.—The case of *Ellison v. Airey* was determined on the special penning of the will; the *Attorney-General v. Crispin*, was upon the fund being given for life. The determinations have been, that the persons, in order to take, must bear the description at the death of the testator. In this case, the codicil only takes the £1,000 out of the residue, for the particular purpose of securing the annuities; there is no gift but of the residue, the determination as to which cannot be varied by the £1,000 being taken out for a particular purpose.

Testator gave the residue to the children of *A.* By a codicil, he ordered £1,000 to be set apart as a security for annuities; a child born after the death of the testator, shall not take a share of the £1,000, it shall sink into the residue after the death of the surviving annuitants. Where a supplemental bill brings a new interest before the Court, it is open to the parties to make any objection to the decree which might have been made at the first hearing.

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*Lord Chancellor.*—Where a supplemental bill brings a new person, or a new interest before the Court, it is open to the parties to make any objection to the decree that might have been made at the first hearing.

It is intelligible, that by “the children of *A.*” the testator means children then born; if you go farther, it must extend to all possible children. To tie it up to the death of the testator, is rather a forced construction.

Where it is to one for life, and then to the children, it shews the intention to be children born then. If it was a specific legacy to one for life, and then to be divided, there could be no doubt.

If it were of a part to one for life, then to fall into the residue, and then the residue was ordered to be divided among children, the same principle would apply; which must extend to all the children: therefore, if the £1,000 was to be divided at the death of the surviving annuitants, it must be divided among *all* then born; but the difficulty here is, *that the general estate must be divided at the death of the testator.* The circumstance of taking out a part for the special purpose, does not seem very material. If he says nothing upon the subject, upon the death of the surviving annuitant, it must sink into the residue, which is divisible at the testator’s death; and it is repugnant to say, one part of the residue shall be divisible at one time, and the other part at another.

I think it must fall into the residue.

I have always thought, that the case of *Ellison v. Airy*, went on a refinement, and was beside the intention of the testator (*a*).

(*a*) The cases upon this subject are collected in the Editor’s note to *Andrews v. Partington*, post, 401.

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DOO v. BRABANT (*a*).

Gift to trustees in trust for *A.* till 21, then to transfer to *A.* but in case *A.* should die under 21, leaving children, then to the children, and in case *A.* should die under 21, without children, then to testatrix’s nieces, the defendants. *A.* attained 21, but died in the life-time of the testatrix, leaving issue the plaintiffs born before she attained 21. Qr. Whether the children of *A.* shall take this legacy, or it shall go over to the defendants? The question sent to a court of law, and there determined, that the events pointed out not having taken place, the plaintiffs took nothing under the will.

**SARAH COUNSELL** made her will, dated 7th August, 1777, and thereby gave £1,000 three per cent. consol. annuities, and other effects, to trustees, in trust for *Sarah Counsell*, of the age of twelve years, until she should attain her age of twenty-one years; then to transfer the said sum to the said *Sarah Counsell*, her executors and administrators, to and for her own use and benefit: and in case the said *Sarah Counsell* should die under the age of twenty-one years, leaving any child or children of her body lawfully begotten, then in trust for all and every such child or

(*a*) Reg. Lib. A. 1790. fol. 43.

children

children who should live to attain his, her, or their age or ages of twenty-one years, and to be equally divided between them, share and share alike, if there should be more than one such child, and if there should be but one, then in trust for such child, but in case the said *Sarah Counsell* should die under the age of twenty-one, without leaving child or children, or being such, they should all die under twenty-one, then in trust for testatrix's three nieces, *Mary*, *Ruth*, and *Sarah Ogle*, equally to be divided among them.

In the year 1780 *Sarah Counsell* married *Benjamin Doo*, and died in April 1790, in the life-time of the testatrix, leaving the two plaintiffs her only children, surviving her, and in the same month of April, *Sarah Counsell*, the testatrix, also departed this life. *Mary* and *Sarah Ogle* died also in the life-time of the testatrix, and *Ruth Ogle* married the co-defendant *Brabant*, and they claim, in her right, the trust money mentioned in the bequest, upon the contingencies, as having lapsed by the death of *Sarah Doo* in the life-time of the testatrix.

The plaintiffs, the children of *Sarah Doo*, claimed also the bequest in the will, and prayed, by the bill, to have the same secured for their benefit.

The cause came on to be heard in Michaelmas term last, when *Mr. Mansfield*, for the plaintiff, contended—that although the event of the mother's dying under twenty-one did not take place, yet the intent of the testator must prevail, and words must be supported in the will to favour that intention. The children were equally objects of the testator's bounty with the mother. So in real estates, if the intention can be effectuated, the heir at law shall not prevail against the will. *Jones v. Westcomb*, Prec. Canc. 316. *Bradford v. Foley*, Doug. 63. *Statham v. Bell*, Cowp. 40.

*Mr. Solicitor-General* for the defendants.—It is clear that the testator only meant to give this money to the children in case the mother died under twenty-one, but not if she lived to attain that age; for had she survived the testatrix after that period, it is impossible to doubt but that the children could not have claimed to the prejudice of the husband. It would not then have lapsed, but been vested: and therefore the question is, whether there is any case in which a certain absolute interest has been given upon the event of a party attaining twenty-one, and that the legatee attains twenty-one and then dies in the life-time of the testator, that the Court has said, because the legacy became absolute upon the contingency taking place, the person interested in the remainder in case such interest shall not take effect, shall be entitled to it, in the event of the party dying in the life-time of the testator.

The gift to the children was only in one event, upon the contingency of her dying under twenty-one, but she lived to that period; and had she survived the testatrix, the children would have been defeated. Suppose the mother had had no estate limited to her,

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and this interest had been given over to the children upon her dying under twenty-one; as she attained twenty-one that devise would have lapsed, and the children could not have claimed. As to *Jones v. Westcomb*, the event of a child being born was uncertain and unknown to the testator. Here the event took place in the testatrix's life-time.

*Bradford v. Foley* arose upon the second marriage of the son; and in that, and the former authority, the event never happened; in this it has, which circumstance makes a material distinction.

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Mr. *Ridley*, on the same side.—This is a lapsed legacy, and the plaintiffs now cannot claim under the description in the will. The Court cannot raise an intention for them in opposition to the words of the will, even supposing the intention to have been as Mr. *Mansfield* contends. It does not appear from the words of this instrument; and the Court cannot make a will in their favour. In (*a*) *Calthorpe v. Gough*, at the *Rolls*, there was a legacy of £10,000

(*a*) Instead of the report of this case which was here inserted by Mr. *Brown*, the Editor has taken the note out of 4 T. R. 707, n.†

Sir *Henry Calthorpe*, by his will, dated 27th *February*, 1741, directed that £10,000, part of his personal estate, should be placed out by his executors, in their own names, in some of the public funds, to the use and intent that they should pay the interest thereof, during the joint lives of Sir *Henry Gough*, and Dame *Barbara* his wife, into the proper hands of the said Dame *Barbara*, or as she alone should, by writing appoint, the same being intended to be at her sole use and disposal; and in case she should die in the life-time of her husband, to the intent that they should pay the said £10,000, or any part thereof, in such manner, and to such persons as the said Dame *Barbara* should, by writing attested by two witnesses, appoint; and for want of such appointment, to pay the same unto and amongst all the children of the said Dame *Barbara*, who should be then living, equally; and if no such children should be then living, to pay the same to such person as should be then in possession of the testator's real estate, by virtue of his will; but if the said Dame *Barbara* should survive the said Sir *Henry*, her husband, then the said executors should, after the death of the said Sir *Henry*, pay the whole sum of £10,000 to the said Dame *Barbara*, to her own use; and the tes-

tator directed that all the residue of his personal estate should be laid out in the purchase of land, and settled to the uses therein mentioned. On the 7th of *March*, 1745-6, the testator made a codicil in his own hand-writing, by which he appointed another executor, and trustee, to see and cause to be paid, at equal payments, the legacy to his sister Lady *Gough*; and afterwards followed these words, "In case my sister's children do not live to their several ages of twenty-one years, the legacy left to her is to revert to my heir at law." Lady *Gough* survived Sir *Henry* her husband, but died in the life-time of the testator, leaving the plaintiff and also the defendants *Richard Thomas Gough*, *John Calthorpe Gough*, *Elizabeth Gough*, and *Barbara*, the wife of *Isaac Spooner*, and Lady *Palmer*, the wife of the defendant Sir *John Palmer*, her surviving; Lady *Palmer* died afterwards in the life-time of the testator; and the testator, who became a lunatic, in the year 1747, and continued so till his death, died 14th of *April*, 1788. The plaintiff, Sir *Henry Gough Calthorpe*, filed his bill, praying that the residue of the testator's personal estate, which was directed to be laid out in land, and to be settled on himself in tail, with remainder to the defendant *Richard Thomas Gough*, in tail; with remainder to the defendant *John Calthorpe Gough* in tail, with remainder to the plaintiff in fee, might be paid to him; and that it might be declared

1000 to Lady Gough, if she survived her husband, but if she died in the life-time of her husband, leaving children, then to her children: she survived her husband, and died, having children in the testator's life-time; the decree was, that the children could not

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Mansfield in reply. It would be absurd to suppose, that the testatrix meant to die intestate as to this property; she certainly intended to provide both for the mother and the children, and that if the first taker of it could not have the benefit, the second should; and all the authorities before cited have gone upon that principle.

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and that the legacy of £10,000 was intended. *Mitford* and *Trower* insisted that Lady Gough having survived her husband, the legacy became immediately absolute to her, and all her directions as to the £10,000 came to an end; and as she afterwards died in the life-time of the testator, Lady Gough had been a widow at the time the will was made, the testator would have given her the legacy absolutely, and would have made no mention of her children. *and Romilly*, for the defendants, insisted, that they, together with the plaintiff, were entitled to this legacy of £10,000, equally; that it appeared to be the intention of the testator, if Lady Gough should make no appointment, and should, for any reason, be incapable of taking the legacy, it should go amongst all her children; and that in the event which happened, no appointment had been made; and Lady Gough could not take the legacy. They cited *Jones v. Combe*, 1 Eq. Ca. Abr. 245. and *v. Bell*, Cowp. 40. in the last of these cases, a testator reciting that he was then pregnant, declared that if she brought forth a son, she should inherit his estate at twenty-one; if a daughter, he gave one moiety to her, and the other to his two sons equally, at twenty-one; if he died before that time, the sons should have her share; if both died, he gave his estate to his wife and her children. The testator's wife was not born; and the only daughter of the testator died an infant. The court held, that the wife was entitled to the estate, because it was the intention of the testator, that if no son should be born, and no daughter live to twenty-one, the wife should have the whole estate; and so in the present case it appeared to be the

plain intention of the testator, if Lady Gough could not take the legacy, and should not appoint to whom it should be paid, that it should go to her children; and that the codicil shewed this intention more clearly, for the testator there mentioned the event in which (and it is to be presumed in which only) the legacy was to go to the person entitled to the personal estate, (viz.) their dying before they attained twenty-one years.

Master of the Rolls.—This is an absolute legacy to Lady Gough, qualified on account of her situation as a married woman. If she died in the life-time of her husband, she had a power of disposing of it, and if she did not so dispose of it, it was to go to her children, if she survived her husband she was to have it absolutely. There was no event in which the children could take any thing, which it was not in her power to deprive them of. The testator presumed, (as every testator does) that the persons who were to take under his will would survive him. If the testator had foreseen the event which has happened, he probably would have provided for it, but that consideration ought not to influence my judgment, for the same observation will apply to all cases of lapsed legacies. As to the codicil, I cannot see that it makes any difference; Lady Gough would have taken the legacy just in the same manner under the codicil, as if it had remained upon the will alone. His Honour did not decree the personal estate to be paid to the plaintiff, although both the defendants who had remainders in tail, consented to it, but referred it to the Master to enquire what were the limitations of the estates to be purchased with the money, and whether any person besides the defendant had any interest in it.

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*Lord Chancellor* this day gave judgment.

After stating the case, his Lordship went on to the following effect: The question is, Whether the legacy, with respect to *Sarah Counsell* having become lapsed, the money shall go over to her children, or to the devisees over, the nieces of the testatrix; or it shall be considered as lapsed absolutely, and therefore go to the next of kin?

Till the last case, from the time of the last preceding decision, this question has been at rest: but the decision at the *Rolls* has broke in upon the rule that has been established; that case has not been appealed from, and therefore has all the authority that acquiescence can give it, therefore I shall not object to the present case going to the Court of *King's Bench*.

The old rule is, That where there is a particular estate, created with a remainder over, and the first estate is void, the second estate shall prevail, as if it were an original estate. So where the first estate is for life, to a person incapable of taking, with a remainder over, the remainder-man will take immediately.—I suppose the authority referred to by Mr. Justice *Powell*, where he puts the case of a monk, and says, that where an estate is given to a monk for life, with remainders over, that the remainders shall not take place till after the death of the monk, and if he die in the life-time of the testator, the remainders shall not take place, is 19 *Henry 6*. I looked into the book, because I suspected there was no such case, as I thought it unreasonable. I take the law to be quite otherwise, and that the remainders should take place immediately. The same is the case where there is land limited to two jointly, and the one dies in the life-time of the testator, the estate will survive to the other. There are no cases of executory devises of this sort: but whether it be by way of executory devise or contingent remainder, the law seems to be, that where the event has actually happened, the case will fall under the same reasoning as if it were given as a remainder. Suppose it were a negative condition for life to *A*. if *A*. lives to twenty-one, if not then over. If *A*. died under twenty-one, (though I do not remember the particular case to have been decided) the general principle must prevail. So if *A*. gives an estate to *B*. on a condition, and if he does not perform it then over, the determination must be the same. There have been different determinations as to this point; and I wonder at it, because it was originally decided as it was afterwards. There is a case in *Fortescue*, 104, that the estate having lapsed, the condition lapsed, and the remainder could not take place. In that case an estate was given to *A*. upon condition of paying £100 to *B*. and the estate lapsed; but upon the same reasoning that was used in that case, Lord *Hardwicke*, in *Avelyn v. Ward*, 1 Ves. 420, decided that the limitation was good, and that wherever there is a conditional limitation, and the first estate becomes void, the second estate shall take place. This doctrine has since prevailed,

*Hayward*



*Hayward v. Stillingfleet*, 1 Atk. 422. The rule is, that where there is a conditional limitation, it shall not be considered as a precedent condition, but as a description of the estate. This point first received its determination in the cases on *Waith's will*: there the testator died, leaving a wife and three sisters. He devised to his wife for life, remainder to the child she was then supposed to be ensient of, and in case if such child should die before twenty-one, without issue, the reversion to his wife and two sisters *Elizabeth and Anne*. The question first came on in *Jones v. Westcombe*, Pre. Ch. 316, afterwards in *Andrews v. Fulham*, 2 Stra. 1092. *Roe v. Wicket*, *Guilliver v. Wicket*, 1 Wils. 405, and in *Avelyn v. Ward*, 1 Ves. 420. Lord *Hardwicke*, in *Fonnereau v. Fonnereau*, (see 1 Ves. 421,) denied the case of *Glasscock v. Warren* (a), Comb. 437, because it was not to be found upon the roll; but I do not think that a sufficient ground. *Page v. Haywood*, 2 Salk. 170, is only a gift in special-tail. *Davis, lessee of Pearce v. Norton*, 2 P. W. 390, when I considered this case I was surprised at the note; it is against all the principles, and in the teeth of former decisions; all the remainders were vested, and should have taken place; the case is no authority for any one point; it is misconceived from beginning to end. From the whole of the determinations on the case of *Waith's will*, I must take it as a rule, that wherever the prior estate is made to depend upon any described event, and the second estate is to arise upon the determination of that event, the first is not to be taken as a condition precedent, but, upon its failure, the second estate must take place.

The case of *Scattergood v. Edge*, 1 Salk. 229, is so ill reported, that it is not easy to discover what points were determined.

In *Fonnereau v. Fonnereau*, 3 Atk. 645, Lord *Hardwicke* reported to the general rule.

*Statham v. Bell*, Cowp. 40, was held to be a contingency with a double aspect, on the one event void, on the other good, as if it had never been contingent.

*Bradford v. Foley*, was only a common contingent remainder; its only view was to defeat the remainder, if *Thomas* married any of the kindred of *Muriel Aynscombe*.

The case I alluded to as contradicting the rest, is *Calthorpe v. Gough*: That was a contingency with a double aspect; if Lady *Gough* survived her husband she was to take; if she died in his life-time the children were to take. The Court held that there was a condition precedent. This seems to be directly against the rule that has been laid down, and if it is to stand, will subvert it.

These are the cases which go to the principal point.

But here is another singularity. Suppose that in *Calthorpe v. Gough* it was right that it should go the children, whether it will apply to this case? It will if the children were the objects of the

(a) Should be *Estcourt v. Warry*.

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testator's bounty; but it was not meant for children born after *Anne* attained twenty-one. Then the question is, whether these are the persons intended to take in the second instance, for they must be the same persons who were intended to take.

In *White v. Barber*, 5 Bur. 2703, and Amb. 701, the after-born children were held to be within the description of posthumous children; that case seems to have gone further to come at the intent of the testator than is necessary in the present. It was contended there, that if the description was grammatical, it must be followed, and that the word *posthumous* could not, in its grammatical sense, be applied to the after-born children, that there was nothing in the will to vary the natural sense of the word *posthumous*, and that if he had had children *really posthumous*, they must have taken, but the Court only certified that they could not conceive the testator meant to exclude his own children in favour of nephews.

If the testatrix here did not mean to exclude the children of *Anne*, the nieces cannot take.

It being admitted that the children were born before *Anne* attained twenty-one, the *Chancellor* inclined to decide in their favour, but gave liberty to the other side to have a short case (stated as upon leasehold property (a)) for the opinion of the Court of *King's Bench*.

The case was accordingly sent to that Court, and the question was put, "Whether the plaintiffs took any, and what estate in the said leasehold premises, by virtue of, and under the will of the said *Sarah Counsell*?" it was argued, and the Court certified as follows:

We have heard counsel, and considered the case, and are of opinion, that *the plaintiffs took no estate whatsoever* in the said leasehold premises, by virtue of, and under the will of the said *Sarah Counsell*; the events upon which the limitation under which they claim was to take place, not having happened.

*Kemyon.*

*William Henry Ashhurst.*

*Francis Buller.*

*N. Grose.*

9th June, 1792.

\* \* This cause came on 13th July following, before the lords commissioners *Ashhurst* and *Wilson*, upon the equity reserved; when their lordships confirmed the certificate, and dismissed the bill without costs (b).

(a) This precaution had not been complied with, but the Court permitted the form of the case to be altered, after argument. As to a court of law not taking judicial notice of a lien of a trust, or of money, vide *Sabbarton v. Sabbarton*, For. 245. *Porter v. Bradley*, 5 T. R. 146. *Parsons v. Parsons*, 5 Ves. 581. That the Court of

*King's Bench* will, contrary to the old practice, answer a case sent by the *Muster of the Rolls*, vide *Dainty v. Dainty*, 6 T. R. 313. *Horton v. Whitaker*, ante, vol. ii. 88.

(b) Mr. *Fearn* divides the cases upon this head into three classes; first, those in which the limitations in question have been after a preceding estate, which

is made to depend on a contingency which never takes effect. Secondly, where the limitations over have upon a conditional determination of a preceding estate, where such preceding estate never took effect, and where they have been upon termination of a preceding estate by a contingency which, though the preceding estate takes effect, nevertheless happens. Extremely minute subtleties often tend more to perplex than to elucidate; these distinctions have been disregarded in all subsequent discussions of this question, and they serve more to display the legal correctness of that proceeding than the learned and ingenious writer, who assist in presenting a clear view of the various determinations. The question in these cases, and the one which Mr. Fearn has recently referred to, is, whether the condition be annexed to the preceding estate, or is a condition precedent upon which the subsequent limitation depend. No precise words, as has been repeatedly decided, are necessary to constitute a condition precedent in wills. The intention, as deduced from the whole will, must govern the particular expressions; and the words of apparent condition in these, as in other cases, been governed and controlled by the context. In the following cases the condition has been considered as affixed to the preceding estate, and not as a condition upon which the subsequent

limitation was to depend. A construction to which the Courts have inclined; for, as observed by Lord Almonley, (3 Ves. 320.) these conditions shall never be extended beyond what is absolutely necessary from the context of the will, and shall not be supposed to govern any disposition, except that upon which they may be naturally supposed to attach. *Napper v. Sanders*, Hutt. 119. *Luxford v. Cheek*, 3 Leo. 125. *Scattergood v. Edge*, 1 Salk. 229. *Jones v. Westcomb*, 1 Eq. Ab. 245. *Tracey v. Letheuillier*, Amb. 204. 3 Atk. 774. *Avelyn v. Ward*, 1 Ves. 420. *Bradford v. Foley*, Dougl. 63. *Statham v. Bell*, Cowp. 40. *Horton v. Whitaker*, 1 T. R. 346. *Pearsall v. Simpson*, 15 Ves. 29. *Meadows v. Parry*, 1 Ves. & Bea. 125. *Murray v. Jones*, ib. 313.

In the following cases on the other hand, it has been considered as a condition precedent, which must happen in order to give effect to the subsequent limitation, *Holcroft's case*, Moor, 486. *Estcott v. Warry*, Comb. 437. S. C. nom. *Grasscott v. Warren*, 12 Mod. 128. 2 Eq. Ab. 361. (which seems directly over-ruled by *Statham v. Bell*, sup.) *Davis v. Norton*, 2 P. W. 390. *Sheffield v. Lord Orrery*, 3 Atk. 282. *Russell v. Russell*, 5 Burr. 2806. *Doe v. Shipphard*, Dougl. 75. *Doe v. Wilkinson*, 2 T. R. 209. *Calthorpe v. Gough*, sup. *Doe v. Brabant*, sup. *Denn v. Bagshaw*, 6 T. R. 512. *Holmes v. Cradock*, 3 Ves. 317. *Humberstone v. Stanton*, 1 Ves. & Bea. 585.

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HARRIS v. JAMES.

THE defendants appeared to a bill, and a joint answer was drawn for them all; only three appeared at the office to swear, which was refused by the officers.

Richards now moved, that the answer might be filed, as answer to the three who appear to swear to it; and stated as practice, that where an answer is proposed as the answer of three and two only appear to swear it, it is taken as the answer of two.

The Chancellor said—the practice, if it prevailed, was wrong; the officer's was a good objection, and that if he granted the motion,

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An answer prepared for five, cannot be sworn to, as the answer of three of them only.

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motion, he should direct the officer to do an improper thing, and that the answer ought to be amended.

Mr. *Richards* saying this could not be, as it was not filed :

Lord Chancellor refused the motion (a).

(a) In *Done v. Read*, 2 Ves. & Bea. 310, where certain defendants had declined joining in a joint and several answer, which had been taken by commission, in the title of which their names were included, it was said, that the answer should be received as the answer of those who swore it, and this erroneous practice was adopted by the Court; but in *Cooke v. Westall*, 1 Mad. Rep. 265, an answer, stated to be the joint and several answers of two, but

sworn only by one, was ordered to be taken off the file, with costs. In *Griffiths v. Wood*, 11 Ves. 62, an answer, misnaming the plaintiff, in *Pisters v. Thompson*, Coop. Ch. Rep. 249, an answer, the title of which omitted the words, "to the bill of complaint of," and in *Cope v. Perry*, 1 Mad. Rep. 83, an answer, purporting to be an answer to a bill of five complainants only, when there were six, were all ordered to be taken off the file.

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Hall, 14th Dec.

REDDING v. WILKES (a).

Putting a deed into the hands of a solicitor, to prepare a conveyance of the estate to a son-in-law (after marriage) not a part performance of a parol agreement, so to do, so as to take it out of statute of Frauds: a demurrer allowed on that ground to a bill for specific performance.

PLAINTIFF stated, by his bill, an intermarriage between himself and the daughter of defendant; and that the defendant, previous thereto, promised to pay to the plaintiff the sum of £500 as a marriage portion; that the defendant had, at different times, paid him £300, which plaintiff had laid out in purchases which he had settled on the marriage; but that defendant had never paid, and refused to pay the other £200, pretending that he only promised £500 stock, and that the £300 he had paid amounted in value thereto; whereas plaintiff charged the promise was of £500 sterling.

Plaintiff further stated, that, after marriage, the defendant promised the plaintiff, that in order to increase his income, he would convey certain messuages to plaintiff and his wife, and directed him to prepare conveyances of the same, which being produced to him, he refused to execute.

The bill further stated, that the defendant pretended he could not pay any further sum without injuring his family, as he intended to convey the premises; and with respect to the conveyance stated, that he had in his possession the original lease of the premises, and that a conveyance of the same having been drawn according to defendant's directions, he had directed certain alterations to be made therein, which having been done, he refused to execute the same. The bill contained several interrogatories, &c. to defendant's substance, and the state of his family, and ability to pay the £500 without injuring them.

(a) Reg. Lib. B. 1791. fol. 191.

To

To this bill the defendant demurred, and first, as to the discovery whether he did not pretend that he could not pay the £500 without injury to his family, and of the state of that, and of his substance, he shewed as cause of demurrer, that the plaintiff had not, by his bill, stated such a case as ought to entitle him to a discovery thereof; and as to the discovery whether the defendant, after the marriage, promised the plaintiff to convey the premises in bill named, and the instructions to prepare the conveyances, he, for cause of demurrer, shewed that plaintiff, by his own shewing, was not entitled to such discovery; and answered, with respect to the promise of the £500, that he had promised £500 stock, the value whereof he had paid to plaintiff.

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Mr. Brown, for the plaintiff, with respect to the former part, said—that being to interrogatories immaterial to the question, the demurrer might prevail; but as to the latter, it should have been a plea of the statute of Frauds, not a demurrer. That the allegation of the bill was, that a conveyance had been prepared, and alterations made by the defendant's desire, which was a part performance.

Lord Chancellor said—that putting the deed into the solicitor's hands to prepare the conveyance, was not sufficient to take it out of the statute of Frauds; that the statute is different in the case of marriage from other circumstances; and that marriage had been held not to be a part performance; and

Allowed the demurrer (a).

(a) As to the doctrine upon the subject of part performance of parol agreements, vide *Whitchurch v. Bevis*, ante, vol. ii. 559, and the Editor's note to it.

ANDREWS v. PARTINGTON (a).

Lincoln's-Inn
Hall, 16th Dec.

ROBERT ANDREWS, grandfather of the plaintiff, made his will, bearing date 19th August, 1763, and thereby gave to the defendants Partington and Andrews (the father of the plaintiffs), all his real and personal estates (subject to debts), in the first place, to pay taxes, repairs, and for the renewal of leases, and out of the rents, &c. to pay his wife Margaret £800 a-year, until his daughters Diana and Catherine should marry, and after their marriages, £600 a-year for life, and subject and without

Bequest of a residue to all the children of A. the daughters' shares to be paid at 21, or marriage, the sons at 21, or to be sooner advanced for their benefit, with survivorship and interest for maintenance. The fund shall be divisible when the

(a) See a very important point in this cause upon the subject of maintenance, ante, 40.

eldest attains 21, and the division shall be among those then in esse.
prejudice

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prejudice thereto, out of the rents and profits, to raise £3,000, as soon as might conveniently be, after his decease, to be paid in manner following, (*i. e.*) £2,000 to his daughter *Diana*, and £1,000 to his daughter *Catherine*, accumulating the surplus rents and profits during the life of his wife; and after the decease of his wife, the further sum of £7,000, to be paid to his daughters, at such times, and in such proportions as therein mentioned, (*i. e.*) £3,000 to *Diana*, on the day of her marriage, and £4,000 to *Catherine*, on the day of her marriage, provided such marriages should happen after the decease of his wife; and in case either of his daughters should marry in the life-time of the wife, then her share to be paid her within six months after the death of the wife; the shares of the daughters, after decease of the wife, to bear interest at £4 *per cent.*, and in case his said daughters, or either of them, should die unmarried, then upon trust to pay the share or shares of her or them so dying, in the manner following, (*i. e.*) £2,000, part of the £3,000 share of *Diana*, to all and every the child and children of his son Robert Andrews, equally to be divided between and among them, if more than one, share and share alike, and if but one, then to such only child; the parts or shares of such child or children to be paid in manner following, (*i. e.*) the daughters' shares at her or their ages of twenty-one, or day or days of marriage, which should first happen, and the sons' share or shares, at his or their age or ages of twenty-one, or to be sooner advanced for his or their preferment in the world, or benefit, if the trustees, or the survivors of them, &c. should think fit, with survivorship among the children, the dividends and interest thereof to be paid, by the trustees, toward the maintenance and education of such child and children till their shares become payable, in proportion to their respective shares and interests therein; and in case all the children should die before their shares became payable, then the £2,000 to be paid to his son Robert Andrews. The testator also declared the uses as to the remaining £1,000, given to his said daughter *Diana*, for the benefit of the children of his daughter Margaret Ashcroft, and with respect to £2,000 of the £4,000, his daughter Catherine's share, he also gave it in the same manner with the first £2,000, given to his daughter *Diana*, and the other £2,000, part thereof, he gave among the children of his daughter Margaret Ashcroft, in the manner therein mentioned; and he gave the residue of his estate, after the death of his wife, after payment of £1,000, to his son Robert Andrews, and three annuities to persons since dead, to the children of defendant Robert Andrews, in the same manner with the £2,000 given in the first place to *Diana*.

The testator died 27th August, 1763, and his wife, and defendant Partington, proved his will.

The widow died 23d May, 1774, leaving defendant Partington the surviving executor.

Catherine

Catherine Andrews, one of the testator's daughters, intermarried with *John Neale Pleydell Nott*, Esq. and £4,000, part of the £7,000, were, after decease of the mother, paid to the trustees named in the settlement upon the marriage, together with £1,100, arising from savings, and from another fund.

The remaining £3,000 was never raised, *Diana*, the other daughter, never having married; but interest for the same has been paid to her from the death of the widow.

Sarah Andrews, wife of the defendant *Robert Andrews*, son to the testator, died in *April*, 1781, and the plaintiffs are the children of that marriage, six of whom had attained their ages of twenty-one, previous to the filing of the bill, and the six others were minors.

The bill prayed (among other things) that the freehold and leasehold estates might be sold, and six-twelfth parts of the produce, and also of the residue and accumulation, might be paid to the six plaintiffs who had attained twenty-one, and the remaining six-twelfth parts be placed out at interest for the benefit of such of the plaintiffs as are infants, &c.

The cause came on to be heard 1st *March*, 1790, when the only question decided was relative to the maintenance, (vide ante, p. 60.) and it was referred to the Master to enquire (*int. al.*) what children the defendant *Andrews* then had, and had had, and at what times they were respectively born, and in case any of them were dead, then when they respectively died.

July 11th, 1791, the Master made his report, and thereby stated, that the defendant *Robert Andrews* had issue, by his late wife, the following children, and no more, plaintiff *Elizabeth*, born 1761, *Robert* 1762, *Catherine* 1764, *George* 1765, *Charlotte* 1766, *Sarah* 1767, *Cæsar* 1770, *Hugh* 1772, *Henry* 1773, *Frederick* 1775, *Marianne* 1777, *Augustus* 1779; and that besides the above-mentioned children, the defendant *Andrews* had issue, by his said wife, the following children, who were dead, *Sarah*, born 1760, died 1763, *John*, born 1769, died 1783, and *Charles*, born 1776, and died in the same year.

And now the cause coming on for further directions upon the Master's report, the question was, what children should take under the bequest of the residue? First, whether all such children as the defendant *Robert* should have at the time of his death? Second, whether it should be confined to such as were living at the death of *Margaret*, the testator's widow? Or third, to such children as were living at the time the eldest child attained the age of twenty-one.

Lord Chancellor said—where a time of payment was pointed out, as where a legacy is given to all the children of *A.* when they shall attain twenty-one, it was too late to say that the time so pointed out shall regulate among what children the distribution shall

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shall be made. It must be among the children *in esse* at the time the eldest attains such age. He said he had often wondered how it came to be so decided, there being no greater inconvenience, in the case of a devise, than in that of a marriage settlement, where nobody doubts that the same expression means all the children (a).

(a) The rule laid down by Lord Hardwicke, in *Ellison v. Airey*, 1 Ves. 111, which was followed in the present case, has frequently been stigmatized as a refinement, and as contradicting the intent of the testator; and it has been regretted that the same construction has not been adopted in this respect in wills, as in marriage settlements: the answer to that is, that in marriage settlements, as before marriage, there can be no children to whom it can be applied, such a limitation must of necessity mean all the children, as there is no place in which to draw the line; and in a marriage settlement it seldom happens that the husband and wife, or one of them, has not a life estate, by which the distribution is prevented, till the possibility of more children coming *in esse* is at an end.

In these bequests to children or other persons who are designated as a class, the court always endeavours to construe the period of distribution as late as it can, in order to include the greatest number of persons within the testator's bounty. The cases upon this subject may be conveniently divided into three classes; 1st where there is simply a general devise to children or other persons, as a class, in which case it comprehends all persons answering that description at the time of the testator's death, *Hill v. Chapman*, post, 391. 1 Ves. jun. 405. *Viner v. Francis*, ante, vol. ii. 658. *Singleton v. Gilbert*, 1 Cox, 68. *Davidson v. Dallas*, 14 Ves. 576. The case of *Martin v. Heathcote*, ante, 234, is in opposition to these and the other authorities, and may be considered over-ruled by them. 2d. where there is a previous life estate, in which case all the persons answering the description at the extinction of that life are included, *Baldwin v. Carver*, Cowp. 209. *Ayton v. Ayton*, 1 Cox, 327. *Attorney-General v. Crispin*, ante, vol. i. 586. *Devisme v. Mello*, *ibid.* 537. *Middleton v. Messenger*, 5 Ves. 136. *Paul v. Compton*, 8 Ves. 375. *Walker v. Shore*, 15 Ves. 122. *Crone v. Odell*, 1 Ba. & Be. 449. afterwards in Dom. Proc. 3 Dow. P. C. 61. The 3d class of cases are those in which, as in the present, the bequest is to children (generally) pay-

able at a certain period, (usually twenty-one or marriage) in which case all children are let in who come *in esse*, before the first child attains the period appointed. *Congreve v. Congreve*, ante, vol. i. 530. *Gilmore v. Severn*, *ib.* 582. *Pulsford v. Hunter*, post, 416. *Hughes v. Hughes*, post, 434. and 14 Ves. 206. *Prescott v. Long*, 2 Ves. jun. 692. *Hoste v. Pratt*, 3 Ves. 730. *Barrington v. Trittram*, 5 Ves. 345. *Whitbread v. St. John*, 10 Ves. 152. *Gilbert v. Boorman*, 11 Ves. 238. and it is now settled, that children *in ventre sa mere*, at the period of distribution, may take, *Clarke v. Blake*, ante, vol. ii. 390. and the cases cited in the note to it, over-ruling *Pierson v. Garnet*, *ib.* 47. and *Cooper v. Forbes*, *ib.* 63.

Where there is a devise to persons in a class, though the gift be to them in the plural, and a direction that they should take as tenants in common, and not as joint tenants, yet if there be only one surviving at the period of distribution, such person will take, *Crookes v. Brookering*, 2 Vern. 106. *Dee v. Sheffield*, 13 East, 526. and the same would probably have been determined in the late case of *Smith v. Shouldham*, 6 Dow. P. C. 22. but for a remarkable clause which followed and controlled the previous devise. And a defective enumeration of the persons composing the class, will not prevent any of them from taking, thus, four children have been allowed to take, where the bequest was only to three, and three, where it was but to two, *Sleech v. Thorington*, 2 Ves. 554. *Tomkins v. Tomkins*, *cit. ib.* and from the Register's book, 19 Ves. 126. n. *Scott v. Fenhoulet*, 1 Cox, 79. *Stebbing v. Walkey*, ante, vol. ii. 85. S. C. 1 Cox, 250. *Humphreys v. Humphreys*, 2 Cox, 184. *Garvey v. Hibbert*, 19 Ves. 125. But if there happens to be no person in existence to answer the description when the period arrives, the Court will not wait to see whether any will come *in esse*, *Godfrey v. Davis*, 6 Ves. 43. Care also must be taken that a devise to a class of persons, should not be after an indefinite failure of issue in another person, as in *Jee v. Audley*, 1 Cox, 324. where a testator gave £1,000 to A. and the issue of her body, in default of such issue to be equally

equally divided between the daughters then living of J. J. and Elizabeth his wife, which would have been good, if it had been to "daughters now living," or "who should be living at the testator's death," but was void, as according to the present doctrine it would comprehend after born daughters; and

such bequests cannot be good in part, and bad in part; therefore if some of the individuals composing the class, be incapable of taking, the bequest cannot be altered either into particular bequests to the individuals, or by subdividing the class itself, *Leake v. Robinson*, 2 Meriv. 363.

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DODSON v. HAY.

THOMAS DOWNES WILMOT, by his will, dated 6th February, 1779, devised in these words, "after all my just debts are paid, I give and bequeath unto my only sister *Eleanor Dearn*, of the city of *London*, the annual produce of 2,000 guineas, to be laid out in a piece of land, in any part of *Great Britain* she may choose, for a place of retirement; the said purchase, when made, to be for ever entailed on her issue, and at her decease, the annual produce of such purchase to be yearly and equally divided among her issue, males and females, for the education, maintenance, and support of them. I also give and bequeath unto the children of my said sister, the whole of all the real and personal estate I may die possessed of, after paying the above intended legacy, and those hereinafter mentioned, and it is my particular will and desire, that the children, all of them, be educated with the yearly interest of whatever portion of my estate that may fall to each respective child's lot or share, and such portion not to be otherwise claimed or inherited, directly or indirectly, until the said children arrive at the age of twenty-two years, whether married or single."

When the testator expresses his intention incorrectly, the Court will effect it by supplying proper words. Where money is given to be laid out in land for a place of retirement for testator's sister, "to be for ever entailed on her issue," the husband of one of the daughters of the sister entitled as tenant by the curtesy to one third. Gift of a residue to children not to be claimed till 22, but the interest given in the mean time is vested.

The testator had not any real estate. At the death of the testator, and at the time of making his will, *Eleanor Dearn* had three children, *Elizabeth*, who afterwards married the plaintiff, and the defendants *Anna Maria* and *Thomas Dearn*, who were infants.

Soon after the death of the testator, *Eleanor Dearn* died, without having had any other children, and soon after her death, *Elizabeth Dearn* married the plaintiff, and died soon afterwards, under the age of twenty-two, having had a child, who lived but a few days.

Upon a bill filed by the children of *Eleanor Dearn*, it had been decreed, that the 2,000 guineas should be laid out in the purchase of Bank annuities, in the name of the Accountant-General, for the benefit of the infants, till it could be laid out in the purchase of lands.

Elizabeth Dodson afterwards dying, the plaintiff filed this supplemental bill against the other infants, and against the executors of the testator, claiming to be entitled, as tenant by the curtesy, to

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to the interest of a third part of 2,000 guineas, and likewise claiming to be entitled, as administrator of his wife, to a third part of the residue of the personal estate of the testator.

Mr. *Hardinge*, Mr. *Lloyd*, and Mr. *Abbot*, for the plaintiff, contended—that he was entitled to be tenant, by the curtesy, of a third part of the stock purchased with the 2,000 guineas; that it was so clear that the wife of the plaintiff took an estate tail under the will of the testator in a third part of that stock, that it would not admit of any argument; and that a husband might be tenant by the curtesy of an equitable estate, and of money to be laid out in land, appeared by the case of *Sweetapple v. Bindon*, 2 Vern. 536, that the plaintiff's wife's share of the residue was a vested interest in her, though she died before twenty-two, they contended, because it was in the first place given absolutely to her and the other children, and there was nothing in the subsequent part of the bequest to shew that the testator intended it should not be a vested interest; on the contrary, the testator, in a subsequent part of the bequest, gave the interest of the legacy to the children, which alone would be sufficient to make their portions vested, although the interest was given for the purpose of maintenance and education, as appeared by the case of *Hoath v. Hoath*, (ante, vol. ii. p. 3.)

Mr. *Selwyn* and Mr. *Romilly*, for defendants.—The infants admitted, that if the plaintiff's wife was tenant in tail, he would be entitled to be tenant by the curtesy, though it was only of money to be laid out in the purchase of land; but they insisted, that the plaintiff's wife, and other children of *Eleanor Dearn*, were not, by the will, tenants in tail; that the testator's intention appeared to be, that after the estate was purchased, a conveyance should be executed, the estates were then to be *for ever entailed* on the issue of *Eleanor Dearn*, and by those words, the testator could not mean that estates tail should be given to them, but that the estates should be settled in such a manner as to be unalienable, as strictly as the rules of law would admit, which could only be done by limiting one-third of the estate to be purchased, to each of the children of *Eleanor Dearn* for life, with remainder to their first and other sons in tail, with remainder to their daughters in tail, with cross remainder in tail; that the testator had himself directed how the estate should go to *Eleanor Dearn*, but with respect to her issue, he required a conveyance to be made, and the Court would take care that the conveyance should be so framed as best to effectuate his intention; that this was the constant course of the Court, not only in the case of marriage articles, which were to be executed by the Court, but also in the case of wills, which contained trusts executory; that this doctrine was expressly laid down by Lord *Cooper*, in the *Earl of Stamford v. Hobart*,

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v. Hobart, Fearne's Contingent Remainders, vol. i. p. 175. (4th edit.) and had been recognized and acted on in many cases, particularly in *White v. Carter*, Amb. 670.

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Mr. *Richards*, for *Thomas Dearn* (the husband of *Eleanor Dearn*, one of the executors of the testator, and administrator of his wife, who was the next of kin of the testator,) insisted—that the share of the plaintiff's wife in the residue was not a vested interest, but by her death under twenty-two, was lapsed, and belonged to the next of kin. He said, that the cases where interest had been given for a legacy, were not applicable to the present case, because the giving interest was merely a circumstance to shew the testator's intention, and if, although he gave interest, he were to declare that the legacy should not be vested, if the legatee died under a certain age, there was no doubt that it would not vest before that age; that in the present case, the testator had used the strongest expressions to shew that that was his intention; he had said, not that the legacy should not be paid, but that it should not be *inherited* till the child attained twenty-two, and the word *inherit* must be used as perfectly synonymous with *vested*, because it was a word as applicable to a future and reversionary, as to a present and immediate interest.

This day his Honour gave judgment.—

Master of the Rolls.—The bequest is, “I give to my sister *Eleanor Dearn*, the annual produce of 2,000 guineas, to be laid out in a piece of land, which she may choose for her retirement; the said purchase, when made, to be for ever entailed upon her and her issue; and at her decease, the annual produce of such purchase to be divided among her issue male and female, for the education, maintenance, and support of them.” The bill is filed by the husband of one of the daughters of *Eleanor Dearn*, insisting that the land, if purchased, ought to be settled on *Eleanor Dearn* for life, remainder to her sons and daughters in tail; and that he having married one of the daughters and had issue, is entitled, as tenant by the curtesy, to her third.

It has not been contended by any of the parties, that *Elizabeth Dearn* took more than an estate for life; and indeed it cannot be contended that she took more.

The gift being of money to be laid out in land, it might have been contended, that she took an estate-tail, on the ground that all her issue were intended to take; but that construction could not prevail in this case, where the produce is to be divided between her issue male and female. I know of no construction but one that can take place, *viz.* that she took only for life.

Then the question is, what the testator meant by issue?

He meant they should take such an estate as they could transmit through an indefinite line of issue.

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It is contended that the Court will adopt all the words of a conveyance, so as to effectuate the intention of the testator; and that the Court will not use the words of the testator, but where they are informal will supply formal words for that purpose. And the Earl of *Stamford v. Hobart*, 1 Bro. P. C. 288. and *White v. Carter*, Amb. 670. are cited to prove this.

The Earl of *Stamford v. Hobart*, arose on Sir *John Maynard's* will.—The *Lord Chancellor* there declared, “That in matters
“executory, as in the case of articles, or a will directing a convey-
“ance, where the words of the articles or will were improper or
“informal, the Court would not decree a conveyance, according
“to such improper or informal expressions in the articles or will;
“but would order the conveyance or settlement to be made, in a
“proper and legal manner, so as might best answer the intent of
“the parties.” This establishes the rule, that where a court of equity carries into execution a conveyance with informal words, it will carry the intention of the party into execution. See then what was done in that case of the Earl of *Stamford v. Hobart*; all the Court did, was to interpose such an estate as would support the remainders.

White v. Carter, Amb. 670. was before Lord *Camden* (a). The question was, what was the intention of the testator as to the issue, whether they were to take as purchasers or not, and the decree went on the ground of its being his intention that the issue should take as purchasers.

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Wherever I can find the intention of the testator, it is indifferent whether it is the case of a trust executory, or of a legal estate—whether the act is complete, or there is a future act to be done. This rule is laid down in *Jones v. Morgan*, (ante, vol. i. p. 206.)

In *Austin v. Taylor*, Amb. 376 (b). it was held the intent of the testator must prevail.

In this will, I can find nothing to shew the intent of the testator to select the sons as objects of bounty; so as to raise estates-tail from them, without giving them the same estates. If I could find such words, I would declare them purchasers, with estates tail to their issue.

Here *Eleanor Dearn* might have many children born after the devise, or unborn at the death of the testator; they must take estates of inheritance, or they must take estates for life without any estates of inheritance grafted upon them. To take the construction of Mr. *Romilly*, I must make a difference between the children then born, and those unborn; for which I see no ground. The testator meant the estate to be entailed for ever; for this purpose, he has given it to the issue as purchasers. It must be to the

(a) It came before Lord *Camden*, upon a re-hearing of a decree of Lord *Northington*, which he affirmed. The judgment, 2 Eden, 366, contains the

substance of the cases upon this subject. Vide *Fearne's C. R.* 184, et seq.
(b) S. C. 1 Eden, 361.

in tail, for he had no intent to make the children of *Eleanor* n, stocks upon which to engraft estates tail, but meant them e estates of inheritance.

en the husband will be entitled, under the case of *Sweetapple* ndon, to be tenant by the curtesy.

en, as to the gift of the residue, "I give and bequeath to the ldren of my said sister, the whole of all the real and personal ate I may die possessed of, after paying the above intended acy, and those hereinafter mentioned: and it is my particular l and desire, that the children, all of them, be educated with : yearly interest of whatever portion of my estate that may fall each respective child's lot or share; and such portion not to otherwise claimed or inherited, directly or indirectly, until : said children arrive at the age of twenty-two years, whether rried or single."

e question is, whether he meant to give any interest in the re to any child, till it should attain the age of twenty-two. words in the first part of the bequest are absolute. The ques- s, whether the remainder will prevent them from being so. nterest to be applied, is of such portion as may fall to the : share of each child—This severs the joint-tenancy. Where nterest of the fund is given, it is *primâ facie* evidence of the s vesting. Then the question is, where vague words follow- shall be sufficient to controul clear words from operating. words are, "That the portions shall not be claimed or in- d until the children attain twenty-two."—It would be a mon- s construction to say, that these words prevented the vesting, s the children should attain twenty-two. If a child died, ng a child, could the testator mean to exclude that child? Yet child must be excluded, if this construction should prevail. a natural construction may be put upon the words, that he the legacy absolutely—that he gave the interest immediately; he legatee was not to command the principal till twenty-two of age. Then it is a vested legacy, though the beneficial use pended (a).

en I must declare the plaintiff entitled, as tenant by the cur- to the third part of the 2,000 guineas; and that in right , wife, he is entitled to a share of the residue, as being a vested est in her, though the control thereof was suspended till she d have attained twenty-two years of age.

As to the cases in which the in- of a fund being given, it has considered *primâ facie* evidence ntention to vest, vide *Walcot v.*

Hall, ante, vol. ii. 305; and for the cases upon the general doctrine, vide *Durson v. Killett*, ante, vol. i. 119, and the Editor's note to it.

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Under a power to devise among children, the testatrix gives to A. (one of the children) for life, remainder to trustees to preserve contingent remainders, remainder to first and other sons, &c. remainder to B. (another son) in the same way. Q. Whether the excess being void, the power is null, and the heir at law shall take, or the sons should take successive life estates, as good under the power; or whether to maintain the general intent, the sons shall take estates tail.

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GRIFFITH v. HARRISON and Others.

GUYON GRIFFITH, D. D. made his will, bearing date the 27th *May*, 1777, and after making the same, became seised in fee of a freehold estate, called *Vawtorts*, situate in the parish of *Sabridgeworth*, com' *Ilertford*, and of a reversion of lands adjoining to it, expectant on the death of *Ann Fowler* widow, since deceased, and became also seised of copyhold lands, being part of the said estate of *Vawtorts*.

The testator being so seised or entitled, and having surrendered the copyholds to the use of his will, made a codicil to his will, bearing date 7th *March*, 1781, duly attested to pass real estates, whereby he gave and devised the farm called *Vawtorts*, together with the reversion of the adjoining tenement, to *Frances Griffith* his then wife, *for life*, and after her decease to *such child or children* of him the said testator, *as she should judge most proper to bequeath the same to, by her will*.

The testator afterwards made a second codicil, dated 31st *December*, 1783, duly executed and attested, confirming his former will and codicil, and thereby gave, devised, and bequeathed *all that estate called Vawtorts*, both freehold and copyhold, *of which he was then possessed*, and *all the messuages, lands, tenements, and hereditaments thereto belonging*, to the use of his wife *Frances Griffith* during her life, *and directed and empowered her to give and devise the same to any one or more child or children of him* the said testator, *by her the said Frances Griffith, in such manner, share, and proportion, as she should direct, in and by her last will and testament, in writing, duly executed, but so as the said estate might not be divided, but transmitted whole and entire to his heirs*.

And reciting that he was entitled, after the decease of *Ann Fowler*, to the reversion of an estate, messuages, and lands adjoining the messuages and lands called *Vawtorts*, he devised the same to his wife for life, and empowered her to devise the same to such one or more of his children as she should appoint by her will, and empowered his wife to grant leases, not exceeding twenty-one years; and declared it to be his will and intention, that the *estate and lands called Vawtorts*, and the other estate adjoining, to which he was so entitled in reversion, *should be considered as one estate, and be transmitted entire to his family*.

The testator died in *January* 1784, without revoking his will or codicil, leaving *Frances* his widow, and also leaving the plaintiff his eldest son and heir at law, and customary heir, and *Thomas Harrison Griffith*, *Guyon Griffith* the younger. *Elizabeth Griffith*, and *Charlotte Griffith*, (which *Thomas Harrison Griffith*, *Elizabeth*

and

and Charlotte, are three of the defendants) his only children, him surviving.

Frances the widow, entered into the part of the estate to which he was entitled in possession, and was admitted to the copyhold, and continued in the enjoyment thereof till her death.

She died 12th January, 1786, having made her will duly executed and attested for passing real estates, whereby she gave and devised all the estates which were devised to her by the said codicils, to her son Guyon Griffith for life *sans waste*, remainder to the defendants John and Moses Yeldham, as trustees to preserve contingent remainders, remainder to the first and other sons of Guyon Griffith in tail male, remainder to the first and other daughters of said Guyon Griffith in tail general, remainder to plaintiff for life, *sans waste*, remainder to the trustees to preserve contingent remainders, remainder to the first and other sons of plaintiff in tail, remainder to defendant Thomas Harrison Griffith, remainder to others of the defendants successively for life, remainder to their first and other sons, remainder to the daughters, with an ultimate remainder to the right heir of the testator.

Guyon Griffith the younger, the devised for life under his mother's appointment, died 21st October, 1789, intestate, unmarried, and leaving no child, but leaving the plaintiff his heir at law, and customary heir.

The plaintiff, so circumstanced, contracted with the defendant Harrison, for the sale of the estate at the sum of £1,200, and an article was for that purpose entered into; but the defendant objecting to the plaintiff's title, this bill was filed for a specific performance of the purchase; plaintiff insisting by the bill, that the execution of the power was void, not having followed the terms thereof; for that Frances Griffith had no authority to limit the premises to the children or issue of the plaintiff, or any of his brothers and sisters, and therefore that the dispositions of the premises, by the will of Frances, not having strictly pursued the words of the power, was wholly void and ineffectual; that therefore the estate had descended upon the plaintiff as heir at law and customary heir of the testator his father, (subject to the estate for life of Ann Fowler, in part thereof, which had since fallen into possession by her death) in the same manner, as if Frances the widow, had made no disposition of it.

The defendant Harrison, by his answer, submitted, to the Court, whether the will of Frances Griffith was a good execution of the power given to her by the codicils to her husband's will, and said he was ready to complete the purchase, if the plaintiff could make a good title.

The other defendants submitted the same question to the Court.

The cause came on to be heard 27th July, 1791, when it was referred to the Master, to see whether a good title could be made, and

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and further directions were reserved till the Master should have made his report.

The Master made his report 2d *December*, 1791, and certified that a good title could be made to the premises.

To this report the defendant filed a general exception, for that the Master ought to have certified that a good title could not be made.

This exception came on now to be argued.—

Mr. *Mansfield*, in support of the exception.—By the power, Mrs. *Griffith* had authority to appoint the estate among her children by the testator; there is no question she might give the whole to any one child; but by limiting it to one son for life only, and then giving it to the sons and daughters of that son, she has exceeded her authority; but still *Moses Griffith* the plaintiff cannot make a good title, and the Master should have reported that he could not; because there is an estate limited by the devise to *Guyon* for life, and although the subsequent estates are void, yet the next estate is to the plaintiff for life only, and the subsequent takers may also take for life, those limitations being good under the power.

Mr. *Solicitor-General* and Mr. *Stanley*, for the plaintiff, contended—that he could make a good title, and must be considered as tenant in tail. (They stated the wills of the first testator, and of the widow, and the facts as to *Guyon Griffith* the younger.) Upon the death of *Guyon*, *Moses* took either as tenant for life under the power, or as heir at law to the first testator. The best doctrine as to the widow's will, is to say it is a mere nullity, not an execution of the power. It cannot be said to be according to the intention of the testator, (which it was the intention of the testatrix to perform) to give successive life estates, nor was it her intention to give such; or that the second son in remainder under her will, should take any thing thereby, whilst there were children living of the first. To make out this point, Mr. *Mansfield* must consider the first named son, as to take an estate for life only. He must then strike all the intermediate estates out of the will, and consider the estate as passing immediately to the next named son. In *Robinson v. Hardcastle*, 2 T. R. 241. Mr. Justice *Buller* held, that in order to give effect to a general intent, the Court would raise an estate tail to the first son. He referred to the cases of *Pitt v. Jackson*, (ante, vol. ii. p. 51.) where it was held an estate-tail in *Mury*, to preserve the general intent; and also to *Chapman v. Brown*, 3 Burr. 1626. and upon the whole, he was clearly of opinion, that *James Dunn* took an estate-tail. If this judgment be right, *Guyon Griffith* took an estate-tail, which being at an end, *Moses* the plaintiff takes an estate-tail also under the appointment; and if the appointment is void he takes a fee as heir

at

at law; or it might be contended, that the appointment for life being bad, the appointees would take absolutely; and if so, *Moses* would take as heir at law of his brother, and in either way could make a good title.

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Mr. *Mansfield*, in reply.—There seems to be a great difficulty in shewing what estate the plaintiff takes; the gentlemen contend he may take either an estate in fee or an estate-tail; but there is no ground to say he takes either the one or the other. There is no case that will support either. *Robinson v. Hardcastle* has no reasoning to this purpose; it is upon quite a different point. In that case there was a power to appoint to any of the children who were then unborn, but it was impossible to give to unborn children for life, with limitations to their descendants. Where a power is executed, it refers to the original deed giving the power, and no limitation can be good in the deed by which the power is executed, that would not be good in the original deed; and therefore it was that the appointment in that case was not good. The case of *Pitt v. Jackson*, under which it is contended that *Moses Griffith* the plaintiff took an estate-tail, is now the subject of an appeal which stands for judgment; and there has been no decision in principle as to that point. *Chapman v. Brown* has also no relation to that point; the Court thought themselves bound by the words. There is nothing in that case to shew, that where an estate is given to *A.* for life, remainder to his issue in tail; that because the gift to the issue was *bad*, it should raise an estate-tail in *A.* In *Robinson v. Robinson*, 1 Bur. 38. it was construed an estate-tail, because otherwise effect could not be given to the intent; but that has not been done, where there was an express estate for life. There is no case that the Court can substitute one estate for another. Here the children were in being, to whom life estates might be limited. She limits to them for life, which it was competent for her to do. It does not follow, from her giving estates to the issue, that she did not mean them to take successively. Then the intermediate gifts being bad, it is the same as if the words giving them, did not stand in the will. Giving the children estates for life, will not disappoint the intention of the original testator; it will not defeat the disposition of the fee. The only effect will be, that the younger children will take estates for life, in preference to the children of the elder children. In the case of the Duke of *Devonshire v. Cavendish*, the limitations were held good, and that Lord George was entitled for life: that case is so far an answer to the argument; and there is no distinguishing that case from this, as to this point. The gifts, therefore, to the children for life, are good, and the intermediate remainders cannot make them otherwise.

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Lord Chancellor said—it did not appear to him that this was an estate-tail: it is argued, that because the intermediate limitations are void, they must be struck out; and that then there are life estates given to all the children; but it is not clear that the testatrix meant the second named son should take, whilst there was issue living of the one named before.

The next day *Mr. Solicitor-General* again enumerated the cases cited before, and added those of *Goodright v. Cornish*, Salk. 226. and *Harris v. Barnes*, 4 Bur. 2157. as to the construction of wills, to preserve a general intent.

Lord Chancellor said—it seemed clear, that where the first estate given under a power is removed, as being a void execution of it, the next, if valid, is brought forward; and that the proposition was clear, that the effect would be the same, where a man had a power given him to make a will, or derived the power from his interest—But directed a case to be sent to the Court of *King's Bench* *.

* The case was argued twice in the Court of *King's Bench*, when the judges differing in their opinion, returned different certificates, *Lord Kenyon* and *Mr. Justice Grose* certifying their opinion that the general intention of the testator must be carried into execution, and, for that purpose, that *Guyon Griffith*, the son, and his brothers and sisters respectively, took estates in tail general: *Mr. Justice Ashurst* and *Mr. Justice Buller*, that *Moses Griffith* took only an estate for life in possession: and could not make a good title. Vide the arguments of the counsel, and the certificates of the judges at large, 4 T. R. 737.

The cause was afterwards set down upon the equity reserved, and the Chancellor, upon hearing the certificate (as is usual in such a case) dismissed the bill *Hilary Term*, 1793(a).

(a) Vide *Pitt v. Jackson*, ante, vol. li. 51, and Sugd. on Powers, 530, where the *cy pres* doctrine is most fully and ably discussed.

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JENNINGS v. HUNTER. }

Where a legacy is of the "value" of securities, &c. though the specification be varied, the legacy is not adeemed.

A legacy of a sum to be divided among children. All

those born before the time of division take.

"Maintenance" not equivalent to "interest" for the purpose of vesting a legacy. No maintenance shall be given when the parent is of ability to support the children.

WILLIAM RICHARDS, by will, dated 3d September, 1775, devised his freehold estates in the city of *London*, and elsewhere, to trustees, for the term of ninety-nine years, and subject to the term, as to one undivided moiety, during the life of his daughter, *Mary Pulsford*, to pay the rents and profits to her for her separate use, remainder to the use of all and every the child and children of *Mary Pulsford*, equally to be divided between them, if more than one, share and share alike, as tenants in com-

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mon, and of the several and respective heirs of the body or bodies of all such child or children issuing, with survivorship, among them; remainder to *Jane Jennings*, another daughter of testator, to her separate use, and to her issue in tail, in like manner; and as to the other undivided moiety, he gave the same to the trustees, in trust, during the life of his said daughter, *Jane Jennings*, to pay the rents, &c. to her sole and separate use, remainder to her child or children in tail, remainder to the separate use of his daughter, *Mary Pulsford*, in like manner, with remainder over, in case of default of issue of both his said daughters.

The trusts of the term of ninety-nine years, were declared to be, that the trustees, and the survivor of them should, after the testator's death, and during the lives of his said two daughters, and the survivor of them, receive and take out of the rents and profits of the premises comprised in the term, so much money as they, or the survivors of them, should think or find necessary for the maintenance and education of the children of his daughters, begotten or to be begotten, and pay the same, for that purpose, in such manner, shares, and proportions, as they, or the survivors of them should, in their discretion, think fit, without any regard or consideration being had to either of his daughters having more children than the other of them, it being his intention that his grand-children should be educated out of the whole rents and profits, to such extent as the trustees should think fit, before any division should be made of the profits between his daughters, and then the surplus was to be divided between the persons entitled to the real estate of freehold, in the proportions in which they were respectively entitled to the same; then the testator gave his leasehold, and other residuary personal estates, to trustees, upon trust, to pay the rents, interest, and dividends of a moiety thereof to his daughter, *Mary Pulsford*, for her separate use, and after her decease, to transfer and assign such moiety unto and among all and every the child or children begotten or to be begotten, who shall be living at the time of her decease, equally between them, and if one only, to such one, and in case of no issue, over to *Jane Jennings* for life, &c. then the other moiety of the personal estate was limited to *Jane Jennings*, for life, to her separate use, and then to her children, as in the bequest to *Mary Pulsford*.

The testator, by a codicil, dated 12th December, 1779; after giving two annuities of ten guineas each, expresses himself thus, "this is an account of value now in my possession, and out of which the said yearly sums are to be paid. Bank notes, to the amount of £190; cash £10. 10s.: ditto, in the hands of Mr. *Drummond*, £2,476. 5s.; £2,676. 15s.; the interest of the remainder part to be applied for the use and education of my grand-children, till they arrive at the age of twenty-one years, and the principal to be then equally divided amongst them, to the reasonable satisfaction of my executors, or successors."

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The cause was heard 28th *February*, 1788, when a decree was made, establishing the will, and directing the usual enquiries as to the personal estate, and particularly the Master was to enquire what cash and Bank notes were in the testator's possession, and what property he had in the hands of Messrs. *Drummond*, the bankers, at the time of testator's death, and also that he should take an account of the testator's debts, &c. and also what grandchildren the testator had living at that period, and the annual value of the estates comprised in the term.

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The Master made his report 15th *November*, 1791, and thereby stated the amount of the personal estate come to the hands of the executors; he further stated, that the testator had no cash in his possession at the time of his death, but was possessed of two Bank notes, of the value together of £30; and he also found, that *Hunter*, in or about *January* 1779, at the request of the testator, deposited, in the hands of Messrs. *Drummond*, two navy bills, of the value together of £2,462. 5s. 4d. which were the property of the testator; and that on or about 16th *August*, 1790, the navy bills and interest were paid off by government, by seventeen exchequer bills of £100 each, and by cash £921. 1s. making together £2,621. 1s. which exchequer bills remained in the hands of Messrs. *Drummond*, in the name of *Hunter*, and the £921. 1s. placed to his account; that about the 5th *September*, 1780, *Hunter* drew a draft on *Drummond*, in favour of *Richards*, the testator, for £21. 1s. which was paid by them, and he afterwards took out the remainder of the sum, and bought nine other exchequer bills, of the value of £100 each, and deposited the same with Messrs. *Drummond*, in his own name, and which made up twenty-six exchequer bills, afterwards sixteen of the bills were, by the testator's desire, deposited with Messrs. *Drummond*, in his own name, and the remaining ten bills paid to *Hunter* and *Howell*, in satisfaction of a debt of £1,000, due from testator to them, as trustees in the marriage-settlement of the testator's daughter, *Jane Jennings*, and that the testator never had, in his own name, any property in the hands of Messrs. *Drummond* than as above stated; and he found that *Mary Pulsford* had issue, at the time of the testator's decease, the plaintiffs, *William*, *Mary*, *Ann*, and *Jane Pulsford*, and since the testator's decease, had issue the defendant, *Sarah Pulsford*, who are all now living; and that *Jane Jennings* had issue, at the time of the death of the testator, one child, *Richard Jennings*, the plaintiff in the second cause, and since the death of testator had had no issue. It also appeared by the report, that the annual value of the premises comprised in the term was £213, subject to deduction for land-tax.

The causes came on this day for further directions.

One question argued was, whether as it appeared that, at the time of the bequest in the codicil, the property in the hands of *Drummond* was navy bills, and had been altered in the manner before

before stated, the grand-children were entitled to the sixteen exchequer bills remaining in the hands of *Drummond* at the time of testator's death.

Lord Chancellor said, that the question in these cases was, whether the specification of the thing bequeathed, remained, at the time of the testator's death the same, as it was at the time of the bequest. That, therefore, if this had been a bequest of navy bills, he must have thought that the grand-children could not take the exchequer bills, because the specification was not the same. The thing given would not have been in existence at the testator's death, but the word in the codicil is "*value*." Now the exchequer bills remaining, answer the description, and are *value* in the hands of *Drummonds*. Therefore his Lordship held, that the bequest was a specific legacy, and that the grand-children were, by force of it, entitled to the sixteen exchequer bills in the custody of *Drummonds*, at the death of the testator (*a*).

Another question was, whether the bequest should be continued to the grand-children living at the death of the testator, or whether *Sarah Pulsford*, born after, should have a share.

And *Lord Chancellor* held—that she should: that all the children born before the division, was actually to take place, that is, until some one of them should attain twenty-one, should take a share (*b*).

It was urged, that here *maintenance* was given, that maintenance was equivalent to *interest*, and that the giving interest had been held to vest the legacy.

But *Lord Chancellor* thought—that however it might be where *interest* is given, yet that the giving *maintenance* was a different case, and was not equivalent to giving interest (*c*); as to this point *Congreve v. Congreve* (ante, vol. i. p. 530.) *Andrews v. Partington* (ante, p. 60.) *Gilmore v. Severn* (ante, vol. i. p. 582.)

A fourth question was, whether there could be any maintenance for the grand-children, raised from the profits of the ninety-years term during the lives of their mothers, the fathers admitting themselves to be capable of maintaining them. It was argued (by *Mr. Mitford*) that this was not the usual case in which maintenance, although expressly bequeathed, was not given, provided the parents were capable of maintaining the children; for the usual

(a) Vide *Askburner v. M'Guire*, ante, vol. ii. 108, and the cases in the Editor's note.

(b) Vide, as to this, *Andrews v. Partington*, ante, 401, and the cases there cited.

(c) The reason for it is thus stated by Sir *W. Grant*, in *Hanson v. Graham*, 6 Ves. 249: "upon the principle that nothing more than a maintenance can be called for, however large the in-

terest may be; and therefore what is not taken out of the fund for maintenance, must follow the fate of the principal, whatever it may be." Vide also *Leake v. Robinson*, 2 Meriv. 386. As to the gift of the interest being a ground to presume an intention of vesting, vide *Walcot v. Hall*, ante, vol. ii. 305, and for the general doctrine, *Dawson v. Killet*, ante, vol. i. 119.

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case was, where the child, in case no maintenance was allowed, was itself entitled to the benefit of the accumulation.

But *Lord Chancellor* held—they should not have it; and reserved liberty for them to apply for a maintenance, either out of the profits of the term, or of the specific legacy, in case it should become necessary (a).

(a) For the alteration of the doctrine upon this point, vide the Editor's note to *Andrews v. Partington*, ante, 60.

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FINCH, D. D. and Others, v. INGLIS, and Others.

Testator having given to charities, legacies, and also a residue, in bank stock; and having no bank stock at his decease, but having 3 per cent. annuities, which would satisfy the legacies in that shape, and leave a residue, but if sold, would not purchase bank stock to satisfy the legacies, in that form: A decree taken by consent, that the legacies should be paid in 3 per cents. according to the sums given. An infant not opposing, his legacy ordered to be paid in the same manner: But if the testator's property had been sufficient, the legacies should have been paid in bank stock.

THE bill stated, that testator *George Stanbridge* being at his death possessed of a considerable personal estate, made and published his last will and testament, dated the 23d of *May*, 1780, whereby he gave and devised as follows: "After all my debts and funeral expences are fully paid and satisfied, my will and desire is, that my personal estate, of what kind soever, shall be as soon as possible sold (except such household goods and utensils as my dear wife *Mary Stanbridge* shall think proper to retain and have for her own use or otherwise); and the monies to arise by such sale, together with all such sum or sums of money as shall be due and owing to me at the time of my decease, may be placed out in some of the public funds, in the name of my executors and executrix hereinafter named, and to be applied in manner as I shall hereafter direct. First, I give and bequeath unto my dear wife the sum of £100, of good and lawful money of *Great Britain*, to be paid to her for her own sole use and benefit, to be disposed of by her as she shall think proper at the time of her decease. Also I give to my said dear wife, the interest of all such monies as I shall die possessed of, or as shall be purchased with the residue of my estate after my decease, to and for her own sole use and benefit, as long as she shall happen to live (except the legacies hereinafter by me given). Also I give and bequeath unto *George Young*, son of *Christopher Young*, of *Old-street*, in the county of *Middlesex*, carpenter. £100 Bank stock, to be transferred to him as soon as may be after my decease. Also I give and bequeath unto *Rebecca Coleman*, and unto *Rebecca Cadd*, of *Edmonton*, the sum of £3 a-year, to be paid to the said *Rebecca Coleman*, and her daughter *Rebecca Cadd*, and to the survivor of them, as long as they should happen to live, the same to be paid half-yearly, as the interest shall be received; the same to commence and be paid at the first half-yearly payment as shall be received after my decease. Also I give unto *Mrs. Elizabeth Billings*, and to *Mrs. Ann Billings*, a ring each of

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of one guinea value. Also I give unto Mr. *George King*, and to his wife, each a ring of one guinea value; and to Mrs. *Hanes* and her niece, each a ring of one guinea value; and to Mr. *Samuel Draper*, schoolmaster, and his wife, each a ring of one guinea value. Also I give and bequeath unto Mr. *George Herbert*, senior, of *Waltham Holy Cross*, in the county of *Essex*, and to his son *George Herbert*; each the sum of £100 *Bank stock*, to be transferred to them as soon as conveniently may be after the decease of my said wife. Also I give and bequeath unto the society known by the name of *St. Alphage Society*, and who now hold their meeting every *Sunday* evening at the school-room in *St. Laurence's Church*, near *Guildhall*, *London*, the sum of £200 *Bank stock*, the same to be transferred into the name of the treasurer of the said society for the time being, after the decease of my said wife, in trust to pay and apply the interest and dividends arising therefrom, from time to time, for the use and benefit of the children under their care, if the said society shall subsist at the time of my decease. Also I give and bequeath unto the vicar and churchwardens for the time being, of the parish of *Edmonton* aforesaid, and to the trustees of the gift of *Thomas Styles*, Esq. the sum of £400 *Bank stock*, to be transferred into their names as soon as conveniently may be after the decease of my said wife, in trust, that they the said vicar and churchwardens, and the trustees of the gift of *Thomas Styles*, Esq. for the time being, do and shall, from time to time, receive the interest and dividends of the said £400 *Bank stock*, and lay out the same in bread, to be distributed from *Michaelmas* to *Lady-day* every year, to the poor of the said parish of *Edmonton* for ever. Also I give and bequeath unto the treasurer for the time being, of the society who call themselves the *Governors of the London Lying-in-Hospital* for married women, the sum of £300 *Bank stock*, to be transferred to them as soon as conveniently may be after the decease of my wife; in trust, to apply the interest thereof to the use and benefit of the said hospital." He gave in a similar manner to the vicar, churchwardens, and committee of the girls school at *Edmonton*, £700 *Bank stock*. He gave to *William Soul*, £100 *Bank stock*, after decease of his wife; and to *George Soul*, son of said *William Soul*, £100, to be transferred into his name, and desired that *William Soul*, the father, should receive the interest for his maintenance; and to several other charities different sums in *Bank stock*, and among the rest, £400 *Bank stock* to the society for the relief of persons confined for small debts, to be transferred to them after the death of his wife, and to be applied to the uses of that charity; and gave the residue of the *Bank stock* to the vicar, churchwardens, and committee, of the girls school at *Edmonton*, to pay and apply the interest to the uses of that charity; and appointed *Thomas Tuck* and *Lawrence Wood* executors.

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The testator afterwards made a codicil, dated 20th *September*, 1782, by which he revoked some trifling legacies, and the gift of £700 to the girls school at *Edmonton*, and in lieu thereof gave £1,000 three *per cents.* standing in his name. He also revoked the gift of £400 stock to the society for the relief of persons confined for small debts, and gave £200 of the like stock for the same purposes, and appointed the defendant *Inglis* executor instead of *Thomas Tuck*.

The testator died 19th *October*, 1782, leaving his wife surviving him, who, together with the other executors, proved the will, took possession of the property, and paid the debts of the testator, and invested such of his property as *Mary* did not take under the will, in one of the public funds, and *Mary* received the interest till her death, which happened about the 15th *March*, 1788.

The bill was filed by the plaintiffs, the treasurers of the several charities to whom the bequests were given, against the executors, and also against the vicar of *Edmonton*, and the treasurer of the girls school, and the churchwardens of that parish, praying proper accounts, and particularly of what was due on account of the legacies; and that it might be declared how, and in what manner, and out of what part of the assets of the testator the same should be paid, and for proper directions.

The defendants, the executors, set forth an account of the testator's stock, by which it appeared that he had various sums in the four and three *per cent.* Bank annuities; but that he was not at his death possessed of or entitled to any *Bank stock*; that the defendants were obliged to sell out some of his stock to pay debts and legacies; and that there was still standing in his name £2,000 three *per cents.* £14,000 four *per cents.* and £154 four *per cent.* Bank annuities, which they were willing to transfer; but apprehended that such personal estate would not be sufficient to pay the annuity, and all the other legacies.

The other defendants (the vicar, &c. of *Edmonton*), claimed to be entitled to the legacy of £1,000 three *per cent.* reduced annuities, given to the girls school, and submitted that the same was a *specific*, and not a general legacy; and also claimed other sums of £4,000 *Bank stock*, and £500 *Bank stock*, given to them on certain trusts by the will; and also the residue of testator's personal estate under the will.

The cause came on to be heard 27th *November*, 1789, when it was ordered that it should be referred to the Master, to take an account of the personal estate of testator, and what *Bank stock*, and other public securities, the testator was possessed of or entitled to at the time of making his will and his codicil, and at the time of his death; and of the amount of his debts; and that his personal estate should be applied in payment of his debts and funeral expences in a course of administration and payment of his legacies,

legacies, except the legacies of *Bank stocks*, as to which his Lordship reserved the consideration of further directions till after the Master should have made his report.

The Master made his report 25th *November*, 1791, and (among other things) stated that he had inquired what Bank stock and other public securities the testator was possessed of at the three periods before pointed out; and he found that the testator was at no one of those periods possessed of any capital Bank stock, but was at the time of making the will, entitled to £2,250 Bank three *per cent.* reduced annuities, £1,725 Bank four *per cent.* annuities, which then stood in his name at the Bank; and at the time of making his codicil, and of his death, he was entitled to £2,250 Bank three *per cent.* reduced annuities, £1,700 Bank four *per cent.* annuities, £100 and £350 Bank three *per cent.* consol. annuities, and he found that the executors had sold out certain funds, with the amount of which he charged them; and that there were then standing, in the name of the testator, in the books of the Bank of *England*, £2,000 Bank three *per cent.* reduced annuities, £1,400 Bank four *per cent.* annuities, and £100 and £250 Bank three *per cent.* consol. annuities, out of which £2,000 Bank reduced annuities he found that £1,000 like annuities were specifically given by the codicil, to the vicar, &c. of the girls school at *Edmonton*, and he found that the debts, funeral expences, and pecuniary legacies, had been paid by the executors, and he found that the testator had given, by his will and codicil, the several specific legacies in Bank stock particularly mentioned in the third schedule to his report (being the legacies of Bank stock to the plaintiffs) amounting together to the sum of £2,500, but he had not computed interest on these last-mentioned legacies, it appearing to him that the testator had not any Bank stock, as before stated.

Mr. *Solicitor-General* and Mr. *Finch*, for the plaintiffs, said—that if the legacies were to be taken as Bank stock, there would not be nearly sufficient to pay them; in that case they must abate in proportion, for it must be considered (the testator having no Bank stock) either as being a sum equal to the purchase of so much Bank stock, or a direction to the executors to purchase so much Bank stock in order to transfer it to the legatees; in both cases the fund would be insufficient nearly to one half the amount; but if taken in three *per cent.* the fund would be sufficient to pay all; then it would amount to a direction that the interest of the stock in his possession should be paid to the wife for life, and then transferred to the legatees, not new funds purchased, that this would be agreeable to the case of *Fonnereau v. Poyntz*, (ante, vol. i. p. 472.) where *Lord Chancellor* thought the testatrix could not mean so much a-year long annuities, because the fund would
not

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not pay a tenth part of the legacies, but so much to be raised by the sale of long annuities.

Mr. *Mitford* and Mr. *Grimwood* for the trustees of the girls school at *Edmonton*, the residuary legatees.—The testator uses the terms “*public funds*,” whereas Bank stock is not a public fund, but only the stock of a trading company.

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Then with respect to the residue, he says, “as to the rest and residue of the Bank stock;” these words are material, for if the legacies before given are to be paid in Bank stock, there will be no residue; he has clearly intended his estate to be laid out in some of the public funds, and has used the term *Bank stock* to express *stocks transferrable at the Bank*, he intended it should be laid out in 3 *per cent.* annuities, and intended that as the fund for payment of the legacies, not the capital stock of the Bank of *England*.

By the codicil, he revokes some of the legacies, and gives different sums in the like stock. He could not mean to refer to Bank stock. The words are such as, at least, to raise ambiguity which will introduce parol evidence.

Lord Chancellor.—In order to make a decree to pay the legacies in 3 *per cents.* I must introduce evidence in order to shew the state of his property, for if it was sufficient to pay the whole of the legacies, they must be paid in Bank stock; if it is to be considered as a latent ambiguity, it must be by reference to the state of his funds at the time of making the will (a). The expence of making that enquiry would exhaust the fund; therefore it will be better to take a decree, by consent, that the legacies shall be considered as legacies of 3 *per cent.* and divided according to the sums given.

The decree was therefore taken *by consent* of the other parties, and as not opposed by the infant, the interest of whose share was ordered to be paid to his father, there being a direction to that purpose in the will.

(a) As to admitting evidence of the state of the testator's circumstances to ascertain his intention, vide the Editor's Note to *Stephenson v. Heathcote*, 1 Eden, 44, and *Andrews v. Emmott*, ante, vol. ii. 297. For the cases in which it

has been admitted for the purpose of ascertaining the identity of a devisee, or the subject-matter of a devise, vide the Editor's note to *Fonnereau v. Poyntz*, ante, vol. 1. 472. and to *Stephenson v. Heathcote*, cit. sup.

EDWARDS v. JENKINS.

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S. C.

2 Dick. 755.

Lincoln's-Inn
Hall, 19th Jan.

THIS was an injunction bill to stay proceedings on a bond, and the cause at law was at issue; an injunction had been obtained want of an answer, and on coming in of the answer and motion to dissolve the injunction, exceptions were shewn for cause, the exceptions were disallowed.

The bill was amended by inserting some fresh charges, and modelling others, and the defendants having obtained time answer, plaintiff moved specially on notice, and on an affidavit swearing generally as to the equity, but not circumstantially, all the facts charged in the amended bill, the discovery of which were material to furnish evidence of the equity insisted

Injunction granted on amended bill, on special motion, without affidavit, after injunction dissolved on the original bill.

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r. Richards for defendant, objected—that the material fact on which the equity was grounded (*viz.* whether the plaintiff knew a sum of £100 had been paid in the cause) had been unequally stated in the former answer so as to destroy the equity of the bill, and that there was no new equity in the amended bill, though he admitted there were material circumstances charged for the equity.

r. Simeon for the plaintiff, contended—that the defendant should not be heard to make any objection, not having put in his answer; that on *special motion* the injunction might be granted or dissolved for want of an answer, even when the injunction had been dissolved on the merits on the original bill. 3 Atk. 694. 1. 26th May, 1749, and Amb. 104. 2 Ves. 19. *Travers v. Lord*, and that here, the injunction had not ever been dissolved on the merits, but on exceptions not holding, which was owing to a want of charges to support the exception, and that the plaintiff must have a discovery before the trial at law, consequently an injunction, and, for that purpose, had introduced new facts.

The Lord Chancellor mentioned a case of *Walker v. Baxter*, 14th Feb. 1746, where Lord Hardwicke had made such order on a bill of course, but thought the latter cases and practice overruled that case; that if the amendments were material to raise any new matter, and were new allegations, it would, on *special motion*, entitle the plaintiff to an injunction until answer, or further order, without any affidavit in support of the amendment or equity of the bill. The Court deciding on special motion, on the amended bill, ordered the bill to stand as amended. L. III. c c what

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what it does of course, on the original bill, and ordered an injunction accordingly (a) (b).

(a) Reg. Lib. A. 1791. fol. 121.

(b) This case is also reported 2 Dick. 755, by the name of *Edwards v. Edwards*, which is correct, Reg. Lib. A. 1791. fol. 121. together with some observations which Mr. *Dickens* submitted to Lord *Thurlow*, in favour of the practice. It is now however settled, upon great consideration, in opposition to this case, that if a plaintiff amends, after an injunction dissolved, upon the answer to the original bill, he cannot apply until the defendant is in default, (not in contempt) for not answering the amended bill, and it is necessary for him to verify the truth of the amended bill by affidavit; the Court in the first instance giving credit to the bill if there is default; in the second instance not giving credit, unless besides the default the bill is also verified by affidavit, *James v. Dornes*, 18 Ves. 522. *Bliss v. Boscauren*, 2 Ves. & Bea. 101. *Vipax v. Mortlock*, 2 Meriv. 476. et vide *Gad v. Worrall*, 2 Anstr. 553. As to the doctrine of amendment in these cases, if the plaintiff, having obtained an injunction, amends the bill, the injunction is gone, unless sustained by the terms of the or-

der, expressing that it is to be without prejudice to the injunction. It is always required that the case upon which an injunction is sought to be granted, should be put upon the record immediately; upon the principle that the party, the prosecution of whose demand is to be delayed by the injunction, shall be delayed as short a time as can be consistent with justice. The Court is therefore extremely jealous of allowing amendment without prejudice to the injunction; but it will occasionally even permit re-amendment. In these cases the Court requires to know what the proposed amendments are; whether they are material, and if material, to have ascertained by clear and positive affidavit, that they relate to facts of which the plaintiff had no knowledge, which could enable him to bring those facts sooner upon the record. It is immaterial whence the plaintiff procures the information, whether from the answer or *alibi*. *Bliss v. Boscauren*, cit. ante. *Mair v. Theterson*, 3 Ves. & Bea. 145. n. *Sharp v. Ashton*, ib. 144. et vide *Turner v. Bazley*, 2 Ves. & Bea. 330.

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Lincoln's-Inn
Hall, 19th, 20th
January.

Where plaintiff has two demands on defendant, the one liquidated, the other matter of account, a writ of *ne exeat regno* shall be marked for the former demand only.

PARKER v. APPLETON.

MR. Solicitor-General, supported by Mr. Scafe, moved for a *ne exeat regno*, in the following case:

The plaintiff's affidavit stated an agreement entered into in 1786, between him and the defendant, who was then in *London*, on behalf of himself and *Benjamin Eyre*, and also of *Richard Smith*, then residing in *America*, by which it was agreed, that they should be concerned together in an adventure of goods sent out to be sold at *Boston*, under the care of defendants, and in which they should be equally interested as to profit and loss; and that goods to the amount of £4,647. 11s. 4d. were shipped from *Great Britain* to *Boston* accordingly, and received there by the defendant *Appleton*:

That it was agreed between plaintiff and defendant *Appleton*, that he should (by his agent) sell the goods, and invest the proceeds in the *American* funds, which he (defendant *Appleton*) did, and purchased 34,000 dollars in the public debt of the *American* States, bearing an interest of 6 per cent., in his own name or the name

name of his agent; and further stated, that the present value of the said 34,000 dollars amounted, at the least, to £9,000 sterling.

The affidavit also stated that the plaintiff had advanced to defendant *Appleton*, the sum of £700, and that the defendant had paid, on account thereof, £302. 5s. 6d. to plaintiff's use, leaving a balance due to plaintiff of £397. 14s. 6d. that plaintiff's whole demand on defendant therefore amounted to £2,647. 14s. 6d.

It also stated, that plaintiff had acknowledgments and vouchers for only a small part of this demand, and could not proceed at law without a discovery from defendant; and that plaintiff had been informed, and believed, that defendant intended to depart the kingdom, and go abroad out of the jurisdiction of this country to avoid discovery, and the account, and that in case defendant was permitted so to do, plaintiff would be in great danger of losing his debt.

The plaintiff's solicitor swore, by his affidavit, to a conversation with *Benjamin Parker*, the confidential friend of defendant, wherein the latter said, that the defendant had informed him that he had taken an opinion on the subject of plaintiff's demand, and understanding that plaintiff would have a right to recover against him in a court of equity, he, the defendant, in order to avoid being sued in any Court here, intended to quit the kingdom, *and go and reside in Boston, in America, of which town he is a citizen*, by which means he understood he should be enabled to avoid payment of said demand.

There was also a further affidavit, that *Benjamin Parker*, being applied to to make an affidavit of these facts, declined so to do, on account of the intimacy subsisting between him and the defendant; and the deponent (plaintiff's solicitor) also swore by his affidavit, that he had been informed the defendant concealed his place of residence, as letters, &c. were addressed to him at the *Salopian Coffee House*, within the verge of the Court, to which coffee house he usually resorted.

Lord Chancellor, at first, had difficulties about granting the writ; but upon it being mentioned the second day, and a full affidavit stated by *Mr. Solicitor-General*, he ordered the writ to issue, and to be marked for £2,000, as the plaintiff's share of the monies invested in the *American* funds, without taking notice of the matter of account subsisting between them (a).

(a) Vide *Shearman v. Shearman*, ante, page 370, and *Atkinson v. Leonard*, ib. 218, and the Editor's notes to these cases.

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HILARY TERM,

32 GEO. III. 1792.

S. C.
2 Dick. 776.

Practice.

Where there are cause and cross cause, and the plaintiffs in the original cause are many, several of whom are out of jurisdiction, others not to be found, and some Peers of the realm, a motion that service on the clerk in court should be good service—refused; but plaintiffs shall not proceed in the original cause, till they have answered the cross bill.

ANDERSON and Others v. LEWIS. }
LEWIS v. ANDERSON and Others. }

THESE were a cause and a cross cause relative to the *Air Bank*.

Mr. *Graham* moved, on the part of the defendant in the original, and plaintiff in the cross cause, that service of the *subpœna*, to appear and answer to the cross bill of the plaintiff *Lewis*, on the clerk in Court for the plaintiffs in the original cause, might be deemed good service on the defendants in the cross cause, who have not already appeared.

He stated as the reason for his motion, that the defendants in the cross cause were very numerous, the transaction being a very extensive one; that many of them had become insolvent, and could not be found to be personally served; many of them were in *Scotland* out of the jurisdiction of this Court, and several of them were Peers of the Realm, to serve whom with his Lordship's letters and copies of the bill in the ordinary course, would be beyond the extent of any man's fortune: to obviate the objection that might be made, that it would be imposing a hardship upon the clerk in Court, he observed that being all plaintiffs in the original bill, they must have employed one solicitor, who would, of course, employ but one clerk in Court, who must know the place of abode of all of them, and therefore could easily give them notice of the filing of the bill.

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He cited 1 Cha. Ca. 67. (*Love v. Baker*) where an action having been brought by defendants at *Leghorn*, a *subpœna* left with a party here, was ordered to be good service on parties abroad, and upon want of an answer, an injunction went: the defendants moved to dissolve the injunction: Lord Chancellor *Clarendon* advised with the judges, and on their opinion dissolved the injunction; but this was against the opinion of the Bar; and in the Pract. Reg. 342. it is laid down as the practice, that where the defendant has a bill pending here, or a suit at law against the complainant, and the now defendant is not to be found or heard of, or is beyond sea, the Court will, on motion, order service on another of the parties the clerk in Court, or the attorney at law, to be good service.

Lord

Lord Chancellor said—the effect of the motion would be to compel an appearance of the party by a clerk in Court whom he had not appointed: That the case cited, was only of service for the purpose of an injunction bill; that, in that case, service on the attorney at law, has been held good service, but in no other; that in any other, making a man appear, by appointing as clerk in Court for him, was what was never done; and therefore Lordship refused the motion (a).

Mr. Graham then moved, that the passing publication in the original cause should be staid until a fortnight after the plaintiffs should have put in their answers to the cross bill.

This was opposed; but Lord Chancellor said, that the plaintiffs in the original cause, who were defendants in the cross bill, must appear *gratis*, and put in their answers in the second week, before they could be admitted to proceed in the first week.

The cases upon this subject are contradictory; and in some instances considerable laxity has been permitted in service upon agents, &c. in consequence probably of some early decisions in Dickens. Thus, in *Hales v. Esdaile*, 1 Dick. 26. *Carter v. Deane*, ib. 39, service upon persons for defendant, under letters of attorney, have been held good service. *Deane v. Forster*, ib. 102. and *Archibald v. Leslie* v. ———, cit. 1 Sch. & Lef. 238, service was allowed on an agent. In *Gardiner v. Mason*, post, v. 478, service in a cross cause on the clerk in Court, of the defendant, who was plaintiff in the original cause. In *Gildenichi v. Charnock*, v. 171, service to clerk in Court to amend an amended bill, was held good service, but that was on the special circumstances, as though he had not been served with a subpoena, he had

appeared on two motions. But in *Roberts v. Worsley*, 2 Cox, 389, the plaintiff having amended after answer, and the defendant being then abroad, the Court would not allow service on the clerk in Court to be good service. An application somewhat similar was also refused in *Bond v. The Duke of Newcastle*, ante, 386. And in *Smith v. The Hibernian Mine Company*, 1 Sch. & Lef. 238, Lord Redesdale expressly over-ruled two of the cases in Dickens. And therefore, except in the case of an injunction bill (where service on the attorney of the plaintiff at law, has been held good service, for the cases upon which, vide *Burke v. Vickars*, ante, 24. and the Editor's note,) and perhaps in that of an executor abroad, proving a will by a letter of attorney (1 Sch. & Lef. 239.); the Court will not allow such substitution of service.

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ANDERSON

v.
LEWIS.

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JOHN BADRICK, JOHN GREENING, JOHN }
DELL, JOSEPH STEVENS, and JOHN } Plaintiffs.
COOPER.

CHARLOTTE STEVENS, ELIZABETH EVANS, }
and Farmer BULL, } Defendants.

Testatrix gives legacies to be paid within three months out of a bond debt due to her; the obligor afterwards, in the life-time of testatrix, paid the debt, and took up the bond; the legacies are thereby adeemed.

JOYCE TAPPING, the testatrix, made her will, dated the 13th May, 1784, which, *inter alia*, contained the following clause: "Also I give and bequeath unto *John Badrick*, of *Burton*, in the county of *Bucks*, labourer, and *John Greening*, of *Marsworth*, in the said county of *Bucks*, yeoman, who formerly lived with me as servants, the sum of £30 each, to be severally paid to them within three months next after my decease, out of two hundred pounds due from *John Cooper*, (thereby meaning the plaintiff *John Cooper*) to me on bond. Also I give and bequeath unto *John Dell*, of *Leighton Buzzard*, in the county of *Bedford*, butcher, and *Joseph Stevens* of *Leighton Buzzard* aforesaid, glover, the sum of £50 each, to be severally paid to them within three months next after my decease, out of the said sum of £200 due to me from said *John Cooper*. Also I give and bequeath unto the said *John Cooper*, the sum of £40, being the remainder of the said sum of £200, due from him to me as aforesaid." The testatrix, after bequeathing several other pecuniary legacies to be paid out of her personal estate within the same period of three months next after her decease, gave and bequeathed all the rest and residue of her money, chattels, rights, credits, and personal estate whatsoever and wheresoever, from and after payment of her debts, legacies, and funeral expences, unto her half sister *Charlotte Stephens*, and her daughter *Elizabeth Evans*, to be equally divided between them, share and share alike, and she appointed the defendants executrixes and executor of her will, who proved the same, and possessed assets.

About the 10th of *August*, 1786, in the life-time of the testatrix, *John Cooper* paid the debt with interest, and took up his bond; but whether voluntarily, or upon demand, did not appear.

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The question was, whether the payment adeemed these legacies.

Mr. *Cooke*, for the plaintiff, argued—that this is neither a bequest of the debt, nor part of the debt, but is demonstrative within the notion of the *Civilians*; that is a legacy, in its nature a general legacy, but where a particular fund is pointed out to satisfy it;

it; as in *Pawlet's case*, where there was a bequest of £500 which my sister has now in her hands of mine; the legacy was held due, although the debt was paid testatrix ten years before her death. So *Theobald v. Vynn*, and *Squib v. Chicheley*, cited in *Pawlett's case*, Sir T. Raym. 335. Again in *Ford v. Fleming*, 2 P. W. 469. *A.* gave her grand-daughter £40 out of a debt due to the testatrix from *J. S.* for rent, she allowing her part of the charge of recovering the same: Lord Chancellor *King* held that the testatrix receiving in the debt herself, though upon her suing for it, was no ademption of the legacy. This decision must have proceeded upon the ground of its being a general legacy, notwithstanding a fund was mentioned out of which it was to be paid; for if it had been a specific legacy, it is clear from all the cases, that the testatrix having called in the debt, it would have been adeemed.

Attorney-General v. Parkyn, Amb. 566. and (r) *Cartwright v. Cartwright* (cited ante, vol. ii. p. 114.) are in favour of the plaintiff's claim; and *Savile v. Blasket*, 1 P. W. 777, is expressly in point. There Sir *Edward Blasket*, by his will, gave to his two daughters £2,000 a piece, to be paid in the manner therein mentioned, that is £500, part thereof he directed to be charged upon, and raised out of premises comprised in his marriage-settlement; and on which lands, he declared by his said will, he had power to charge £1,000. Sir *Edward Blasket* had joined with his son in the recovery of these premises, and had thereby, (according to the opinion of the Court, on a question raised in the cause) extinguished his power to charge. And Lord *Macclesfield*, upon the hearing for further directions, notwithstanding these sums had been charged on a fund which failed, decreed them to be paid out of the father's personal estate, which is the same as if he had declared the two sums of £500 to be general legacies. These authorities, Mr. *Cooke* insisted, were sufficient to prove the plaintiff's claim well founded:

But the Court dismissed the bill without costs (a).

(r) Accurately stated in *Wooddson's System of Laws*, vol. iii. Appendix.

(a) See this case cited in the argument of *Roberts v. Pocock*, 4 Ves. 153, where it is distinguished from *Ashburner v. Macguire*, ante, vol. ii. 108; for the general doctrine upon the sub-

ject, vide the Editor's notes to *Ashburner v. Macguire*, *Moore v. Moore*, ante, vol. i. 127, and *Land v. Devaynes*, post, vol. iv. 539.

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(s) FRANKLIN v. FRITH and Others (a).

Executor keeping money of testator's in his hands, liable to interest and costs. Lord Chancellor said, if he laid it out in the 3 per cents. the Court would affirm his act.

THE testator died in 1781, having appointed defendants his executors, and having, by his will, directed payment of debts out of the funds in their hands at interest. In 1782 a demand was made upon them, by *John Franklin*, of £420. This demand being withstood by the executors, it was agreed to refer the matters in dispute to Mr. *Hill*, and arbitration bonds were entered into, but he not being able to form a judgment upon them, the action which had been brought was tried, and the plaintiff, in 1786, obtained a verdict for £290. In the following term the executors moved for, and obtained a new trial, but neither party proceeded upon the order. In 1781 a suit had been instituted in the Court of Chancery, charging that £500 part of the fund, was trust money belonging to the plaintiffs in such suit. The executors put in their answer immediately, and a decree was made in 1783, referring the matters of the suit to arbitration. In 1786 that bill was dismissed. In 1787 costs were taxed, and paid in 1788. In *January* 1788, the present bill was filed by legatees, and the executors put in their answer immediately, stating that they had always been ready to pay the legacies, if they could have done the same without risk, the plaintiff in the action, and the plaintiffs in the bill threatening to revive their demands, and that the defendant *Burnham* had offered to pay the legatees their legacies, if a Mr. *Smith*, who accompanied them to demand payment, would indemnify them.

The cause coming on, it was referred to the Master to enquire what balances had been in the hands of the executors, and upon what pretences the same had been retained. The Master reported the above, and that the defendant *Burnham* had always kept at his banker's sufficient to repay the balance in his hands, which was about £400.

Mr. *Solicitor-General*, and Mr. *Fonblanque*, for the executors—abandoned the point of interest; but contended, with respect to costs, that the executors ought not to be subjected to them, and for this purpose cited *Newton v. Bennet* (ante, vol. i. p. 359.) where the Court would not charge the executor with the costs of taking the account, and where, though he had caused delay, the Court liquidated that, by not giving him his costs; and *Parrot v. Treby*, Pre. Ch. 254. where it is said that upon a bill to call a trustee to an account, if he, by answer, submit readily to it, though, on the answer, he be found in debt, yet he shall pay interest for

(s) Ante, 73.

(a) Reg. Lib. A. 1791. fol. 155.

the balance only, from the time of the account liquidated, and *no costs*.

Lord Chancellor said—he never could permit an executor to keep £400 of his testator's money dead in his hands, and that *the keeping an equal sum* at his banker's was no proof that he did not make interest of it. With respect to costs, it must depend on the conduct of the executors; if kept to answer the exigencies of the testator's affairs, it would be an excuse for not paying it over; but outstanding demands, even on probable grounds, are no reason why the executors should not lay their testator's money out. If they had laid it out in 3 *per cents*. the Court would have affirmed their act; but from the time the cause was at an end, there was no excuse, there was no pretence that that action had any ground at all, it might therefore have been non-prossed: and as to the other suit, that was dismissed in 1787, so that when this bill was brought, they had kept the money in their hands, without a cause, full four years: therefore they must pay the interest, and costs (*a*).

The *Solicitor-General* mentioned, that in a case *Ex parte Champion*, *Lord Kenyon* held that an executor, laying out his testator's money in 3 *per cents*. was not liable to the fall of stocks.—*Lord Chancellor* seemed to think there had been many such decisions; but *Mr. Solicitor-General* observed, that a case before *Lord Northington*, mentioned by *Lord Kenyon*, in *Ex parte Champion*, was the only one that was even now known to the profession (*b*).

(*a*) For the cases in which executors or trustees have been charged with interest, vide the *Editor's* note to *Newton v. Bennet*, ante, vol. i. 162.

(*b*) Vide *Hancom v. Alley*, 2 Dick. 498. *Peal v. Cranc*, ib. 499. n. and *Howe v. The Earl of Dartmouth*, 7 Ves. 137. where several instances are cited, in which the Court, upon having its observation drawn to the circumstance of the testator's property being either in the four or five *per cents*. or in Bank or *South-sea* stock, has ordered it to be laid out in the three *per cents*. It is different however, where the money

is out on mortgage, the Court not permitting a real security to be called in without enquiry. And as the Court will protect an executor, in doing what itself would have directed, he shall not be answerable for any loss accrued by a fall in the value of the stock. But where a testator died, leaving property and a family in a foreign country, the Court did not consider it as the duty of the executor to send the property to *England*, to be invested, *Holland v. Hughes*, 16 Ves. 111.

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v.
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HUGHES v. HUGHES (a).

Where the period of division is marked out by the testator, only children *in esse* at that period can take; but where the gift is general *all* the children shall take.

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IN the report of this case (ante, p. 352.) it is, by mistake, represented as finally determined; but it since appears, *Lord Chancellor*, at that time, only threw out his general sentiments upon it. The cause stood for judgment on the 31st *January*, when *Lord Chancellor* expressed himself to the following purport:—

Lord Chancellor.—When a testator gives all his property to be divided among his children when they shall attain twenty-one, in so general a manner, the principle of the cases seems to have been, that such a general devise shall embrace *all* the children, and the distribution must be accordingly made among *all*; but where the Court has ascertained *the time as perfectly marked out* by the intention of the testator, it is considered *as the period of vesting the property in possession*, and consequently when it comes to be distributed, *it must be among those only who are in esse at that time*. Here, however, a fortune is given generally to *all the children*, and there seems to be no expression which, either naturally or implied, can exclude any of the *children* from their distributory share: this being a general gift, not narrowed or controlled by any words the testator has used, consequently the youngest child must take at twenty-one, with the rest (*b*).

(a) Reg. Lib. A. 1791. fol. 215.

(b) The decree declared that the residue should be divisible among all the grand-children of the testator that were living at the time of his death, and that had been born since, and that should be born until the youngest of such grand-children should attain the age of twenty-one. The younger grand-child attained the age of twenty-one in 1806. Two grand-children had been born between the death of

the testator and that period, who had died infants. Upon a rehearing, *Lord Eldon* was of opinion that a grand-child, who died before the youngest of the grand-children attained the age of twenty-one could have the benefit only by children and not by representatives; and the decree was varied accordingly, 14 Ves. 246. For the cases upon this subject, vide the Editor's note to *Andrews v. Partington*, ante, 401.



LINGARD and Others v. WEGG and Others.

Order of dismissal set aside, on circumstances.

MR. *Graham* moved, that an order of the 6th *August*, 1791, that the plaintiff's bill should stand dismissed, with costs, might be set aside, on the following circumstances:—

Lingard, with *Hesler*, brought the original bill for an account of monies in the hands of *Wegg*, the defendant: afterwards a negotiation

gociation was entered into by the parties, for adjusting the matters in question, which being unsuccessful, an attachment was issued, for want of an answer, on the 11th *November*, which being served, the defendant put in an answer. After this it became necessary to file an amended bill.

On the 17th *May*, 1791, a commission of bankruptcy issued against the plaintiff *Lingard*, and the assignees not being able to get the consent of the creditors to proceed in the cause till *November*, the plaintiffs were then first informed, that during the sittings after *Trinity Term*, the bill had been dismissed with costs, and the plaintiff's solicitor swore that this had been moved without notice,

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Lord Chancellor thought, that the bankruptcy amounted to an abatement of the suit; but, on the circumstances of the case, set aside the order of dismissal, on the plaintiff's undertaking to file a bill of revivor in a week (a).

(a) Whether a suit becomes abated or not, by the bankruptcy of the plaintiff, has been the subject of much difference of opinion, and the practice in the Court of Exchequer was at variance from that of the Court of Chancery, the former holding by analogy to law, that the bankruptcy was not an abatement, *Ex parte Berry*, 1 Dick. 81. *Sellas v. Dawson*, 2 Austr. 458, n. *Davidson v. Butler*, 2 Anstr. 460. *Monteith v. Taylor*, 9 Ves. 615. In *Randall v. Mumford*, 18 Ves. 424.

S. C. 1 Rose, 196, *Lord Eldon* observed, that the Court, without saying whether bankruptcy is or is not strictly an abatement, holds, that according to the course of the Court, the suit has become as defective as if it were abated, and as the assignees will have the benefit of the suit, the course is to require the bankrupt to bring his assignees before the Court by bill of revivor, or supplemental bill in the nature of a bill of revivor.

Ex parte CHAMPION, in the Matter of *MILLS* and *SWANSTON*, Bankrupts.

A PETITION, by the executor of *John Platt*, wholesale linen-draper, deceased, who carried on business in partnership with *John Platt* the younger, and with *John Turner*, deceased, in behalf of himself, and other creditors of the like description, of *Mills* and *Swanston*, bankrupts.

And the prayer of the petition was, that *Lord Chancellor* would order the commissioners, named in the commission, to compute interest from the date of the commission, upon the debt proved by the petitioner's testator under the same, and upon debts of other creditors under the like circumstances, at such rates of interest as were originally allowed by the bankrupts in their accounts with their several creditors: and that the assignees might be directed to pay the same to the plaintiff, and other creditors.

For

There being a surplus of a bankrupt's estate, interest allowed to creditors, where, by the course of trading and settled accounts, interest was allowed after a certain credit.

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For this purpose, the petition stated, that it had been for many years established as a custom in the city of *London*, that in cases where merchants purchase goods at credit to send abroad, and do not pay for the same when they become due, to allow the tradesman of whom they purchased interest, at the rate of *£5 per cent. per annum*, for *extra* credit to the time of payment; and at some given period of the year, the parties so dealing settle a balance, in which is included interest for the *extra* credit, and the balance so settled is carried to the next account:

That it is also a custom for merchants who purchase goods, and sell the same abroad upon credit, to make up and adjust their accounts annually with their foreign correspondents, to charge them with interest at different rates, from 5 to 6 and 7 *per cent.* for *extra* credit upon goods sold, as well as for interest of money advanced, and to carry on the balances so formed from year to year.

The petition then stated, that the accounts were made up at the ends of several years, and settled in such manner between the petitioner's testator and his partners, and the bankrupts; and that such yearly accounts were checked, examined, and agreed to by the bankrupts; and one instance in which the bankrupts paid to the petitioner's testator, and his partners, a sum of *£1,297. 13s.*, which included interest so settled, and that subsequent accounts were settled in the same manner down to the determination of the partnership between the petitioner's testator and his partners, when there was a balance of *£2,225. 7s. 11d.* due to them from the bankrupts. The petition then stated the commission issued 29th *January*, 1781, and that petitioner's testator proved the said debt under the commission, and received dividends on the same to the amount of 20s. in the pound:

That, after payment of the same, there remains a very large surplus in the hands of the surviving assignees, arising from the bankrupt's effects, to the amount of *£50,000*, which surplus the petition stated to have in a great measure arisen from the circumstance of the interest upon the debts due from the bankrupts to such of the creditors whose debts bore interest, ceasing from the issuing of the commission, and the interest upon debts due to the bankrupt's estate from their correspondents, and particularly those in the *West Indies*, continuing to run at a very high rate of interest to the time of payment:

That on the 20th *April*, 1790, a petition was presented by *Eleanor Morris*, and other creditors of the bankrupt whose debts bore interest, praying that interest might be paid to them from the date of the commission; upon which it had been referred to the commissioners to compute interest on those debts, and that the assignees should pay the same: and that the commissioners had held meetings to carry the same into execution, at one of which meetings the petitioner's solicitor had attended, and requested that
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the commissioners would compute interest on the debts due to petitioner's testator, and a calculation of the interest due to the amount of £616. Os. 10*d.*, was produced to the commissioners, but they refused to admit the claim, alledging that they thought, under the order, they were at liberty to allow interest only on such debts as bore interest on the face of the securities held by the bankrupt's creditors, not on debts like that of the petitioner's testator and his partners.

The present petition was therefore presented, praying as before stated, and alledging that the said debt, after the repeated yearly settlements between the creditors and the bankrupt, is a debt carrying interest on the face of it, and that, under the circumstances, it is a legal as well as equitable debt.

The custom of merchants, as stated, and also the fact as to the yearly settlements of accounts, was verified by affidavit.

Mr. Solicitor-General and *Mr. Mitford*, against the petition.

The order already obtained is the same as was made by Lord *Hardwicke*, in the case of *Sir Stephen Evance* (*Bromley v. Goodere*, 1 Atk. 75.) Lord *Hardwicke* there laid it down, that where interest is given by way of damages, it cannot be computed in bankruptcy; he therefore confined his order to bonds and notes carrying interest, and the relief given was, that the bonds should carry interest, but not to exceed the penalties, but that notes carrying interest should have interest computed on them to the full amount that was due, but he did not give any interest on notes payable on demand, though they would carry interest at law in the form of damages. The same doctrine is laid down in the case *Ex parte Marlard*, 1 Atk. 150. In *Ex parte Rooke*, 1 Atk. 244, the bankrupt was bound, by his own offer, to pay what the Master should report to be due. There is nothing here to bring this debt within the order. The petition states the circumstances of the trading, and making up the accounts. If they had been entitled by the form of the contract to interest, they would have made the demand of it when they first came to demand a dividend under the bankruptcy, but they did not pretend to do that, they proved their debt as a simple contract debt, without any charge for interest.

They now put it upon a custom in this particular trade, but they are not, in any view, entitled to interest.

It is no objection that this demand is new, but if it is not reasonable, that is material.

If they had brought an action, and succeeded, the question would be, whether they were entitled to interest. If they had been held to be so, it must be by way of damages for the detention; and wherever interest is given at law, by way of damages, it cannot be computed in bankruptcy.

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There has been no case of such a demand against a surplus, where interest was not reversed by the form of the written contract.

Lord Chancellor.—I agree with *Lord Hardwicke's* rule, that where a contract is entered into for a certain sum, and interest could not be given at law but in the shape of damages, it is not the course of the Court to give interest in bankruptcy.

That reduces it to this question: whether there was an original contract, that, after the fourteen months' credit, the debt should bear interest.

If the agreement had been put into writing without a specialty that there should be credit given for fourteen months, and if any sums should be in arrear, interest should be paid, one could not doubt but the debt must bear interest.

I take it to be clear, that in all the cases the question has arisen on the original contract.

The contract for interest has been at £5 *per cent.*; but the contract is not proved by writing or conversation between the parties.

It is proved by two *media*, by the custom, and the settlement, that the custom is so general that the parties must have known of it.

I acknowledge there is some difficulty when considered merely on that ground; but it appears, that upon settling the accounts, they have allowed it, and this must proceed on their knowledge that it was right.

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If it is agreed, that there was no title to interest *a priori*, yet the party receiving the account so made up is evidence of an agreement.

Therefore, if the question had been only as to the fact of this practice continuing to the bankruptcy, I should think the interest was due *ratione contractus*, but I do not rely so much on the custom as upon the settling the accounts.

So in the case of interest upon interest, though in other cases the Court will not allow of it, yet where there are regular accounts settled from time to time, interest on interest is allowed.

That is admitted in all cases but that of a mortgage, and that exception only stands on authority. I see no reason why interest on interest should not be allowed in that case, but that it is inconsistent with the rule of jurisdiction; but in merchants' accounts, it is always admitted, on the ground of an original contract, and the settling accounts in that way is evidence of an original contract.

Therefore, they would have been entitled to have proved the interest originally: not having done so, would afford some evidence that it was not the original contract; but that is repellable by the stronger

stronger evidence of its being so, and that circumstance is not strong enough to cut down their original contract.

Therefore, I go on the ground of an original contract, that after fourteen months, the goods shall be paid for with interest, and I do not infringe upon the rule, that the Court does not give interest in bankruptcy, where it would be taken at law as damages.

The custom I consider as evidence of an original contract; it may be that forty out of eighty may not have claimed it. Where it is to depend on the custom, the only difficulty is to establish what the custom is.

In leases, where there is a written contract, it is not unusual to produce proof of custom, with respect to the mode of husbandry, much more here, where the agreement was by parol.

His Lordship therefore made the order as prayed (a).

(a) In the three cases reported in the present volume, which arose out of the same bankruptcy, *Ex parte Morris*, ante, 79. S. C. 1 Ves. jun. 132, the present case, and *Ex parte Hankey*, post, 504, the rule laid down by Lord Hardwicke, in *Bromley v. Goodere*, was extended to allowing interest, where it was the course of trade; that being considered as evidence of a contract. The latter of these cases was brought on before Lord Rosslyn to be reconsidered, in *Ex parte Mills*, 2 Ves. jun. 295. and was affirmed by him. It had the additional circumstance that interest had not been reserved upon the face of the bills, in consequence of the mistake of the person who drew them; vide also *Butcher v. Churchill*, 14 Ves. 567. It was lately attempted to extend the doctrine still further to promissory notes payable on demand, on the principle, that where there is a written undertaking to pay

money on a day certain, or on demand, interest shall run from the day or demand without a contract, (*Lowndes v. Collens*, 17 Ves. 27.) but this was refused, *Ex parte Kock*, 1 Ves. & Bea. 342. S. C. nom. *Ex parte Cocks*, 1 Rose, 317. *Ex parte Williams*, ib. 399.

Separate creditors are however not entitled to interest, until the joint creditors are paid twenty shillings in the pound, *Ex parte Boardman*, 1 Cox, 275. *Ex parte Clarke*, 4 Ves. 677. But if both the joint and separate creditors are paid twenty shillings in the pound, a partner shall not be admitted as a creditor upon the partnership, or upon the individual till all interest has been paid; for it is as much a debt as the capital, *Ex parte Recre*, 9 Ves. 588.

As to not allowing interest beyond the penalty of a bond, vide *Tew v. Earl of Winterton*, post, 489, and the cases cited in the note.

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THE ATTORNEY-GENERAL v. PARNTHORP and Others.

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THE information stated, that by a decree at the Rolls, made on the 10th day of May, 1780, by the late Sir Thomas Sewell, it was (*inter alia*) ordered, that £5,000, Bank stock, £4,000, £4 per cent. consol. annuities, £3,000, £3 per cent. consol. Bank annuities, £3,000, old South Sea annuities, £4,000, reduced £3 per cent. annuities, and £1,000, lottery annuities, the interest of which was given to Frances Barker, then a *feme covert*, (by the will of her father William Loney, deceased,) for her life,

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for her separate use, should be transferred to the *Accountant-General*, and the interest thereof should be paid to the said *Frances Barker*, during her life, for her separate use, and on her death, all parties interested were to be at liberty to apply.

Frances Barker, by power of attorney, duly executed by her, dated 14th *December*, 1780, authorised and impowered *John Barker*, her late husband, to receive the dividends then due, or which should become due on these funds.

The bill further stated, that before, and on the said 14th day of *December*, 1780, the said *Frances Barker* was of unsound mind, and had ever since continued so, and was kept in confinement, and treated as such. That *John Barker*, the husband, by virtue of the letter of attorney, received the dividends; that he was since dead, having made his will, and appointed the defendants his executors. That in the month of *February*, a commission of lunacy had issued to commissioners, to inquire as to the lunacy of *Frances Barker*, and upon the inquisition, it was found that she was a lunatic, and that she did not enjoy lucid intervals, and had been in that state from the 17th day of *December*, 1783, and that the defendants *Alexander Aubert*, *Arnold Mello*, *Dorothy Olympia*, and *Henrietta Aubert*, had been appointed committees of her person and estate.

The prayer was, for an account of the dividends received by the late husband by virtue of such letter of attorney.

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The defendants by their answer admitted that they knew that the said *Frances Barker* had been occasionally, before the execution of the power of attorney, disordered in her mind; but that she appeared to the defendants *Aubert* and *Mello*, who are the subscribing witnesses thereto, at the time of the execution thereof to have the use and enjoyment of her senses and mental faculties sufficiently strong to fully understand and comprehend the nature of the acts she then did; and that before she executed it they explained the nature and effect of it, and that it was authorising her husband to receive the dividends, and expressly asked her if she did it with her free will and consent, which she readily answered she did, and then executed the letter of attorney.

The cause coming on to be heard before *Lord Chancellor*, on the 27th *July*, 1791, his Lordship ordered the parties to proceed to a trial at law on the issue, "whether *Frances Barker* was a lunatic at the time she executed the letter of attorney, and that the jury should indorse on the *postea* at what time she became so."

The cause came on to be tried before *Lord Kenyon*, and a full special jury on the 14th *December*, when a great deal of evidence was given in support of the plaintiff's case, by the persons who attended on *Mrs. Barker*, to prove general derangement, though with intervals of sense. On the part of the defendants several witnesses were called, particularly *Mr. Aubert* and *Mr. Mello*, the subscribing witnesses, who spoke to her being perfectly sound
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and competent at the time of the execution of the instrument; and the other witnesses, who were persons in the habits of intimacy with her, spoke to her having frequent intervals, in which she was perfectly competent to doing any rational act.

The jury, without any hesitation, found a verdict for the defendants, and declined making any indorsement on the record but the general verdict.

This verdict being dissatisfactory to the plaintiffs, they applied, 6th February, 1792, to the *Lord Chancellor* for a new trial, who read *Lord Kenyon's* report, in which he disapproved of the verdict. The application was supported by Mr. *Attorney-General*, Mr. *Selwyn*, and Mr. *Steele*, and was opposed by Mr. *Solicitor-General*, Mr. *Mansfield*, Mr. *Erskine*, and Mr. *Hollist*. The argument turned principally on the special circumstances of the case, and therefore, though demonstrative of the most splendid abilities, is not here reported; but *Lord Chancellor's* judgment lays down such general, though not universal rules on the subject, as may be highly useful in their application to particular cases.

Lord Chancellor.—There is an infinite, nay, almost an insurmountable difficulty in laying down abstract propositions upon a subject which depends upon such a variety of circumstances as the present must necessarily do. General rules are easily framed, but the application of them creates considerable difficulty in all cases in which the rule is not sufficiently comprehensive to meet each circumstance which may enter into and materially affect the particular case. There can be no difficulty in saying, that if a mind be possessed of itself, and that at the period of time such mind acted, that it ought to act efficiently. But this rule goes very little way towards that point which is necessary to the present subject; for though it be true that a mind, in such possession of itself ought, when acting, to act efficiently, yet it is extremely difficult to lay down, with tolerable precision, the rules by which such state of mind can be tried. The course of procedure for the purpose of trying the state of any party's mind allows of rules. If derangement be alledged, it is clearly incumbent on the party alledging it to prove such derangement: if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alledged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alledging such lucid interval, who must shew sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact as where the object of the proof is to establish

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derangement. The evidence in such a case, applying to stated intervals, ought to go to the state and habit of the person, and not to the accidental interview of any individual, or to the degree of self-possession in any particular act; for from an act with reference to certain circumstances, and which does not of itself mark the restriction of that mind, which is deemed necessary, in general, to the disposition and management of affairs, it were certainly extremely dangerous to draw a conclusion so general, as that the party, who had confessedly laboured under a mental derangement, was capable of doing acts binding on himself and others.

The argument urged by the *Solicitor-General*, that after the removal of the disease, when the morbid affection no longer obscures or vitiates the judgment, the mind will labour under a langour and debility which, with reference to its former sound and unaffected state, might render its exertion and decisions very unequal and inferior, carries along with it weight; for I agree that the inferiority of mind would in itself be a degree of evidence to shew that the disorder was not rooted out; the convalescent state would incline to look forward to the removal of the disorder, but would not of itself shew that the disorder was removed. It might allow of the party doing sound and discreet acts; but it would certainly require such acts to be watched and examined with jealousy: nothing could be more dangerous than to try the state of the mind by individual acts, in those cases in which the disorder is, as it is most frequently, *insanity quoad hoc*; at the same time, though partial insanity does frequently prevail, it must always be watched with infinite care, and it seems scarcely possible to extract, from any particular case of this kind, that which will apply to any other.

In *Coghlan v. Coghlan* (a), the judges seem to have thought that there was a clear interval, and this was proved by persons in the habit of watching the patient: such persons can best prove whether the derangement had entirely ceased, or whether there was a perfect interval. By a perfect interval, I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved from excessive pressure; but an interval in which the mind, having thrown off the disease, had recovered its general habit.

In *Greenwood v. Greenwood* (b), which has been stated, the question turned upon this: whether a mind sound to general purposes, in the

(a) This case is cited and stated, 1 Phil. Rep. 120.

(b) Lord Eldon has given the following account of the case of Mr. Greenwood. He was bred to the bar, and acted as Chairman at the Quarter Sessions, but, becoming diseased, and re-

ceiving, in a fever, a draught from the hands of his brother, the delirium taking its ground then, connected itself with that idea; and he considered his brother as having given him a potion with a view to destroy him. He recovered in all other respects: but that morbid

the doing of a particular act, being influenced by a false imagination, an unreasonable persuasion, was not sufficient to avoid such act. A question of so great extent involves serious consideration.

The present case, however, is free from all difficulties of that kind, for there is clear and distinct evidence of *Elizabeth Barker* having, at one period, been mentally incompetent. The woman who attended her was hired to attend, and did attend her as an insane person, the medical man who attended her prescribed for her as such. Nor is there any contradiction in the evidence in this case; they who represent her as having talked reasonably about her property certainly apprehended that such short effort of her mind made her capable of disposing, and that the disposition to her husband was proper; they did not mean to circumvent a weak mind: but I think they scarcely watched the means with sufficient attention; their characters are not impeached. It is, however, an agreed point that she was once undoubtedly insane. But it is said that this particular disease (*furor uterinus*) ought to be deemed a bodily disease; but if it were, and the effect of it produced this constant habitual derangement of mind, it comes to the same end. The jury, however, would not act upon this. The evidence does not prove it, and the medicines administered were not applicable to such complaint.

The jury were to try this question, with reference to the effect of an instrument, revocable in its nature: and therefore the directions, as to the time, were necessary. Nothing can more circumstantially mark an habitual derangement than the conduct of the husband with Mr. *Alchorne*. It is impossible to overlook what was the opinion of the husband; therefore it comes to the question of a person habitually deranged, and whether there was, between the paroxysms of the disorder, any clear decided lucid interval. I think it would be extremely dangerous to all property to say this in such a case.

The verdict is clearly wrong in saying she was not insane *at all*, as all the witnesses agree that she was habitually insane; but whether there was a clear lucid interval is a much nicer question (a).

New trial granted.*

* Upon the new trial at *Guildhall*, 11th July, the jury found a verdict for the plaintiff.

-morbid image never departed, and that idea appeared connected with the will, by which he disinherited his brother. Nevertheless, it was considered so necessary to have some precise rule, that though a verdict had been obtained in the Court of Common Pleas, against the will, the judge strongly advised the jury, on a second trial, to find the other way; and they did accordingly find in favour of the

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will. 11 Ves. 89. There is a similar account of this case, and of other singular instances of delusion in Lord *Erskine's* defence of *Hutfield*.

(a) Though it does not appear very distinctly in the present report, it is well known that Lord *Thurlow* went so far as to say, that where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before;

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fore; and that should be proved by evidence as clear and satisfactory. Lord Eldon, in *Ex parte Holyland*, 11 Ves. 11, dissented from that proposition, and he then (as he has done on other occasions within the remembrance of the Editor), suggested the case of the strongest mind reduced by the delirium of a fever, or any other cause, to a very inferior degree of capacity, "the conclusion is not just, that as that person is not what he had been, that therefore he should not be allowed to make a will. There are frequent instances of men restored to a state of mind inferior to what they possessed before, yet it would not be right to support commissions against them." Another part of the doctrine here established was adopted by Sir W. Grant, in *Hall v. Warren*, 9 Ves. 611, and by Lord Erskine in *White v. Wilson*, 13 Ves. 88, viz. that where general lunacy has been established, the proof is thrown upon the party

alleging a lucid interval. This principle is thus admirably stated by Sir W. Wynne, in the luminous and elaborate judgment delivered by him in the case of *Cartwright v. Cartwright*, 1 Phil. Rep. 100. If you can establish that the party afflicted habitually by a malady of the mind, has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption, for, until proof of habitual insanity is made, the presumption is, that the party, like all human creatures, was rational; but where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason, must prove it. In that case, and in *White v. Drier*, same book 84. lucid intervals were established.

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1 Ves. jun. 412.

Testator left residue to the children of his sisters, *Estrella* and *Reyna*; *Estrella* had children, *Reyna* had none, and had changed her name, and was a nun professed, but he had a third sister, *Rebecca*, who had children, this is not sufficient to substitute the name of *Rebecca* for *Reyna*.

DEL MARE v. REBELLO.

THE bill stated, that *Jacob Del Mare*, late of *Kingston* in *Jamaica*, made his will, 18th October, 1785, and thereby gave to the defendants, and other persons since deceased, "all his government securities in the public funds, which should be standing in his name at the time of his decease, in trust, among other things, to pay the residue and remainder of the interest and dividends of said government securities unto all the children of his sisters, *Estrella Del Mare Jalfon*, and *Reyna Del Mare*, to be equally divided among them, share and share alike, during their lives," with remainders over, among them and their issue; and the testator directed, "that in case the survivor of his said sister's children should die without issue, then the residue and remainder of the interest and dividends of the said government securities, or stocks, should be equally paid and divided among the wardens of certain synagogues therein mentioned," upon trusts therein set forth, and appointed the defendant, and the other trustees, executors.

The testator died 30th September, 1789. One of the executors having died in his life-time, the defendant, and the other surviving executor, proved the will; but the latter also dying, the defendant was the sole surviving executor.

The testator, at the time of his decease, left three sisters, viz. *Estrella Del Mare Jalfon*, wife of *Zacharias Jalfon*, of *Leghorn*,
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in *Italy*, *Maria Hieronyma* (formerly called *Reyna*) *Del Mare*, who having changed her religion to that of a Roman Catholic, and having become a professed nun at *Genoa*, had changed her name to *Maria Hieronyma*, and *Rebecca Del Mare*, wife of *Samuel Del Mare* (uncle to the testator), and who, by him, was mother of the plaintiffs.

Estrella Del Mare Jalfon had, at the death of the testator, seven children (the co-defendants) all of whom, except one, defendant *Abraham Jalfon*, were abroad.

Maria Hieronyma (formerly *Reyna*) *Del Mare*, never was married, or had a child.

The plaintiffs argued, by the bill, that being a nun professed, she could not be supposed to be the sister for whose children the testator meant to provide. The plaintiffs therefore contended, that the name *Reyna Del Mare* was inserted by mistake, and contrary to the intention of the testator, the said *Reyna* never having had a child, and having changed that name for that of *Maria Hieronyma*; nor could *Reyna Del Mare* be called by the name *Del Mare*, unless she had married a man of the same name, as *Rebecca Del Mare*, the plaintiff's mother, had done.

The plaintiffs further charged, that the testator always corresponded amicably with their father and mother, but that he never corresponded with *Reyna* (otherwise *Maria Hieronyma*) who was to be considered as civilly dead, and that he frequently had expressed his intention of providing for the plaintiffs. The prayer of their bill therefore was, to be decreed to be respectively entitled to an equal share of the interest, &c. of the said residue, with the several children of *Estrella del Mare*.

The only material defendant, *Abraham Jalfon* (as supporting the interest of his brothers and sisters) by his answer, put in issue the question of the insertion of *Reyna's* name by mistake, and claimed the residue (unless the said *Reyna* had a child or children) to belong to and be divisible among himself and the other children of *Estrella del Mare Jalfon*.

The cause came on to be heard 8d *February*, 1792, when

Mr. *Solicitor-General*, and Mr. *Fonblanque*, for the plaintiffs, contended—that this was a case of mere mistake, by which the testator had inserted the name of *Reyna* instead of *Rebecca*. That it was very nearly the case of *Bradwin v. Harpur*, Amb. 374 where the testatrix gave by mistake one moiety to *Ann*, who was dead at the time, and the Court there corrected the mistake. It was also like the case of *Parsons v. Parsons* (a), April 1791, where the testator gave a sum of money to secure an annuity to his brother *Edward Parsons*, and after his death, to be divided among his children. The testator had had a brother, named *Edward*, but

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(a) 1 Ves. jun. 266.

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he was dead at the time of making the will, and had left no child; but he had a brother, named *Samuel*, at the time of making the will, who had a wife and children, and it was in evidence that the testator had been in use to call *Samuel* by the name of *Ned*; the Court decreed in favour of *Samuel*, upon the ground of clear mistake. Here the testator could not mean the sister, who, whilst she was a *Jewess*, was called *Reyna*. She had changed her name: her legal name was now *Maria Hieronyma*, and she was no longer in the situation (as the testator knew) to have children, being a nun professed; he thereupon must have meant *Rebecca*, who had a family to provide for. In this case parol evidence is admissible. If the gift had been to *Reyna* herself, as she had changed her name, if she found it necessary to sue here, she must have shewn that she was the person who had been called by the name of *Reyna*; and if she could be put to evidence to prove her title, that evidence might have been rebutted by any other, to shew that she was not the person intended. It is true, the Court is very delicate as to the admission of parol evidence to explain wills; but it is necessary where there is a latent ambiguity. In both the cited cases parol evidence was admitted. In *Ulrich v. Litchfield*, 2 Atk. 372, Lord *Hardwicke* said, it was one of the cases proper for parol evidence, where there has been a mistake in a christian or surname.

Lord Chancellor, during the argument, expressed great doubt whether parol evidence had ever been admitted to this extent. He said in both the cases there were articles of description which pointed out the persons intended.

His Lordship directed the evidence to be read.

The only deposition read was that of the defendant *Rebello*, who swore to his knowledge of the defendants, but that he never knew *Reyna del Mare*, and never heard that such a person existed, till upon the death of the testator, when application was made to him on her behalf, to know whether she was entitled, as one of his sisters, to any thing under his will. That this application was made to him, as one of the executors; that he afterwards found, from the information he received of her from the family, that she had changed her religion when young, and also her name to that of *Maria Hieronyma*, and became a professed nun at *Genoa*, and was never married, nor had any child, and was a professed nun at the time the testator made his will, and had been so for a great number of years; that he believes the plaintiffs to be the children of *Rebecca Del Mare*, and that *Rebecca* was the sister for whose children the testator meant to provide, and that the insertion of the name *Reyna* was a mistake, and that testator meant to have inserted *Rebecca*; and as the reason of his belief, he stated several conversations with testator as to his will, in which he always understood that the nephews and nieces which testator meant were the

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the children of his two sisters at *Leghorn*, and never heard testator speak of having a sister at *Genoa*; and that the testator corresponded with *Samuel Del Mare*, the father of plaintiffs, and also with *Estrella*, but he never saw any letters from testator to *Reyna* or *Maria Hieronyma*, or any correspondence between her and testator, though he is in possession of the papers, &c. of testator. He also spoke of the residence of the other defendants, the children of *Estrella Jalfon*, with their father and mother, at *Leghorn*.

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Mr. *Lloyd* and Mr. *Finch*, for the defendants, contended, that in this case the parol evidence ought not to have been read. By the gift to the children of the testator's sisters, those born at the death of the testator would have taken; and if *Reyna* had any children, they must have had shares.

The case of *Parsons v. Parsons* does not apply to the present: there was, in that case, no person in existence of the name of *Edward* to take, but it was in evidence that the testator used to call *Samuel Ned*. The only cases in which parol evidence is read are, 1st. Where it is given to persons by wrong names, though the persons who are intended exist, and then evidence is read to shew, that the persons claiming were intended.— 2dly. Where there are two persons of the same name, as in the case put in Lord *Coke's Reports*, 5 Co. 68. there evidence is read to point out which was the person intended. Where persons are called by wrong names it is sufficient, if there are descriptions to point them out. This was the case in *Bradwin v. Harpur*; there were children, and grand-children, to whom the legacies were intended to be given: Mr. *Ambler* in that case cited *Beaumont v. Fell*, 2 P. W. 141. where it was insisted, there was no such person as the one named, upon which the Master of the Rolls laid great stress. Now here there is a description of a person who could take. In *Dowsett v. Sweet*, Amb. 175. the gift was to the son and daughter of *William Wicker*; he had four sons, and one daughter; it was contended, the eldest son was meant to take, and evidence was offered; but Lord *Hardwicke* would not admit it, and gave the whole to the daughter.

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It is admitted that here the parol evidence would be in contradiction of the will. In the case of *Brown v. Selwyn*, (Cas. Temp. Talb. 240) Lord *Talbot* refused to admit the evidence of the instructions being different from the will; and said it was better to suffer a partial mischief than a general inconvenience.

In the present case there was a person who bore the description, she was still *Reyna Del Mare*; the change of name was only an addition, which those ladies always take. She might have sued for the legacy if given to her; for a monk or nun may sue here for a legacy by their own name; profession is no disability. The nun might be released from her vows, marry, and have children.

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Mr. Solicitor-General in reply.—The part of the case of *Dowsett v. Sweet*, referred to in the note of *Bradwin v. Harpur*, is not that cited by *Mr. Lloyd*: it is the former part of the case which applies. Here if *Reyna* had been confirmed by the name of *Maria*, and had sued for the legacy, she must have shewn, by evidence, that her name had been *Reyna*, and that evidence might have been rebutted. In *Parsons v. Parsons* there was no such person as *Edward*; so here there was no such person as *Reyna Del Mare*; there is therefore a latent ambiguity, as there appears to be no *Reyna* till the evidence shews that *Maria Hieronyma* had been called *Reyna*.

Lord Chancellor said part of the policy of giving persons professed or other names was that they might not interpose in the world; but any argument from a child being baptised by one name and confirmed by another would not apply here.

Here the testator had it not in contemplation whether his sisters had children or not at the time of making his will.

The time of distribution goes but a very little way toward discovering the intention of the testator; it would be doubtful in such a case whether it should be confined to the time of the death, or whether what appeared to be his general intent could not be let in.

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He takes no notice in his will of *Reyna* being confined in a monastery, there is no intimation of his intention of excluding her, which there probably would had he intended it. I am not sufficiently satisfied he knew of *Rebecca's* family.

The cause stood over, and, on a subsequent day, *Mr. Solicitor-General*, on the part of the plaintiffs, applied to the Court for a reference to the Master, for the purpose of an enquiry as to further evidence in support of the testator's intent.

Lord Chancellor.—I have duly considered of this case, and am of opinion that the evidence is not sufficient to induce me to presume that the testator meant his sister *Rebecca* instead of *Reyna*; therefore the bill must be dismissed (a).

(a) So in *Andrews v. Dobson*, 1 Cox, 425, where a legacy was given to "James, the son of Thomas A." and there was no such person, the Court would not admit parol evidence to shew that it was meant for "Thomas, the son of James A." But in many cases of wrong or imperfect descriptions of legatees, parol evidence has been admitted, *Hussey v. Berkley*, 2 Eden, 194. *Parsons v. Parsons*, cit. sup. *Abbot v. Massie*, 3 Ves. 148. *Smith v. Coney*, 6 Ves. 42. *Careless v. Careless*, 1 Meriv. 384. That a blank

cannot be supplied by evidence, vide *Hunt v. Hort*, ante, 311. but that a blank for a christian name may, *Price v. Page*, 4 Ves. 680. A great number of cases upon this subject are collected in the Editor's notes to *Stephenson v. Heathcote*, 1 Eden, 38. and *Fonnereau v. Poyntz*, ante, vol. i. 472. In *Fox v. Collins*, 2 Eden, 107. there were two specific legatees of the same name, to one of whom the residue was bequeathed. Lord Northington collected from the general intent apparent on the face of the will, without parol

parol evidence, which it was intended for. That an inaccurate superadded description of objects, will not vitiate if they are in other respects correctly described, vide *Standen v. Standen*, 2 Ves. jun. 589. affirmed in Dom. Proc. 6 Bro. P. C. ed. Toml. 193. *Kennett v. Abbott*, 4 Ves. 808. *Smith v. Campbell*, Coop. Ch. Rep. 278. unless there be fraud, from whence it may be presumed that if known, the legacy would not have been given. As to false allegations and superadded descriptions

of property in a devise, or in a grant, vide *Roe v. Vernon*, 5 East, 64. and the several cases there cited; the distinction being, that when the particular thing is once sufficiently ascertained, the addition of a false or mistaken allegation, will not frustrate it, but where it is in general terms, the addition of a particular circumstance will operate by way of restriction and modification. Vide also *Williams v. Williams*, ante, vol. ii. 87. *Whitfield v. Clement*, 1 Meriv. 402.

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BLENCOW being seised of real and possessed of personal estate, made his will, dated 13th October, 1774, duly attested for passing real property, and thereby, after directing the payment of debts, he gave and devised all his real estates to his wife *Ann Blencow* (since deceased) and her assigns, during her natural life, remainder to his sister *Margaret Boyce* (deceased) for life; and after her decease he directed his estate to be divided into four parts, and devised one undivided fourth part thereof to his niece *Catherine Burt*, the plaintiff's late mother, (deceased) for life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons in tail male, with remainders over. And as to, for, and concerning the residue of his personal estate, the testator willed that an inventory should be taken of the same by his executors and executrix, and exhibited in the Ecclesiastical Court, and he gave his said wife *Ann Blencow* the use, but not the property of his said personal estate for life, remainder to his sister *Margaret Boyce* for life, and after her decease, he gave and bequeathed his said personal estate unto and among all and singular his nephews and nieces, namely, *James Smith*, the said *Catherine Burt*, plaintiff's said late mother, *Elizabeth Willis*, and *Mary Boyce*, equally to be divided between them, share and share alke, at their respective ages of twenty-one years; and testator appointed his wife and others executors and executrix of his said will.

Bond given for a certain sum, which was calculated to be the amount of a residue of a personal estate, it turns out the sum is miscalculated: Bill to have the bond considered as a security only for the real sum dismissed, there being no distinct evidence of the miscalculation.

Blencow died without revoking this will, and the widow and executors proved the will, possessed assets, and paid the debts; and the surplus of the personal estate amounted to £1,140 only, though it was supposed at the testator's death that there would be a surplus amounting to £2,140 at least.

Ann Blencow and *Margaret Boyce* are since deceased.

Catherine Burt had two children, the plaintiff and *Elizabeth*, who some years ago intermarried with the defendant *Barlow*; and
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Catherine Burt considering that the plaintiff would be entitled at her death (she surviving *Ann Blencow* and *Margaret Boyce*) to a fourth part of the testator's real estate, which she conceived to be nearly equal to one fourth of the personal estate, which she (*Catherine Burt*) would be entitled to on the death of the said *Ann Blencow* and *Margaret Boyce*, proposed to secure to said *William Barlow* the fourth part of the said personal estate, which it was supposed would amount to about £600, and executed a bond, by which she bound herself and her heirs, &c. in the penal sum of £1,200, with a condition, reciting the will and death of *John Blencow*, and that it had been computed the proportionable part of the *residuum* of his personal estate, to which she (*Catherine Burt*) would be entitled, on the decease of the survivors of *Ann Blencow* and *Margaret Boyce*, would amount to the sum of £600; and also reciting that the said *Catherine Burt* had agreed with the defendant *Barlow*, who had married *Elizabeth* her daughter, that in order to make him certain of receiving a proportionable share of the estate of the said *John Blencow*, she should enter into a bond to pay him the sum of £600 within three months after the death of the survivors of them the said *Ann Blencow*, *Margaret Boyce*, and *Catherine Burt*: the condition of the bond was, that the heirs, executors, or administrators of *Catherine Burt* should pay unto defendant *Barlow*, his executors or administrators, such sum of £600.

Catherine Burt survived *Ann Blencow* and *Margaret Boyce*, but died 11th May, 1782, having first made her will, and appointed the plaintiff sole executor, and thereby (as appeared by the defendant's answer,) after taking notice of said bond, gave to the defendant the said sum of £600. The plaintiff proved the will, and possessed himself of the estate and effects, and among other things of £285, being the whole of her fourth part of the residue of the said *John Blencow*'s personal estate, and, upon application from defendant *Barlow* to pay him the sum of £600, secured by the bond, informed him that the fourth part of *Blencow*'s estate amounted only to such sum of £285, and that it was the intention of *Catherine Burt* only to secure by the said bond payment of the amount of the fourth of such residue, and offered to pay him such sum; and upon his refusal, offered to have his, plaintiff's, fourth part of the real estate (to which he was entitled under *Blencow*'s will, as tenant in tail, and of which he had suffered a recovery) valued, and to have the value thereof added to the said sum of £285, and then to divide the whole produce equally between them, which the defendant *Barlow* also refused, and commenced an action, in the Court of King's Bench, against plaintiff, as executor of said *Catherine Burt*, upon the bond; whereupon the plaintiff filed the present bill, charging that the bond was only given in order to secure such sum as the fourth part of the residue of the testator *John Blencow*'s personal estate should produce; and that

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uch share had produced £285 only, and praying that the condition of the bond might be rectified and made according to the intention of said *Catherine Burt*, and defendant *Barlow* be decreed to deliver the same up to be cancelled, on payment of £285, and in the mean time he might be restrained by injunction from proceeding in the action.

The defendant put in an answer, by which he insisted that the bond was given to secure him at all events the sum of £600; but admitted it was understood at the time that *Catherine Burt's* share of the residuary estate of the testator, would amount to that sum.

Mr. Mitford.—This bill is brought to have the sum rectified, the plaintiff insisting that it was a mistake in the calculation of the testator's property; and being a voluntary bond, the Court ought to admit evidence of this miscalculation, and rectify it.

This instrument must be made conformable to the intention of the parties. There is express evidence of the instrument itself, which, upon the face of it, in fact, gave to the party interested in it the value of the property she should be entitled to. It was not a liquidated sum, being supposed to be £600, or *thereabouts*. A voluntary instrument executed for no other purpose than that of securing her son in law's share. If it was a bond for valuable consideration, it is clear that, according to the principles of former decisions, this evidence ought to be received, and the *mistake* rectified: It has been so held in cases of *policies*, and the principle is particularly laid down and acknowledged by Lord *Hardwicke* in *Henkle v. The Royal Exchange Assurance Company*, 1 Ves. 317. who says there is no doubt this Court will relieve against mistakes in written contracts, as well as against *fraud*, upon proper proof. Your Lordship held the same doctrine in *Taylor v. Rudd*, 25th June, 1785. That was a case in which there had been a mistake in *fact* as well as law, observing that such a mistake might be rectified by parol evidence, but care must be taken to establish proof of the mistake, which, in that case, was not done; this is in nature of an instrument for the purpose of the parent's securing a provision for her child. The obligor had no other object in view than to secure to her son in law this proportionable *share*. The evidence we have to offer is, that the plaintiff has absolutely received no more than the sum of £285, as the whole value of the personal estate; and therefore it ought to be admitted, and the mistake in his bond rectified.

Lord Chancellor.—You have no distinct evidence of the mistake; had the party acted upon the idea of a general speculation, and you had offered evidence to shew what the intention of the party was, perhaps such a bond as this might have been rectified. Supposing it had turned out to have been *more* instead of *less*, you would

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would also have claimed that surplus. No case touches this point: it is not like that of the son being deceived in the property, and who had stated to his mother that there were £2,000 in the Bank, and she had, in consequence of his statement, secured that sum, and afterwards it appeared that there was no such sum.

Bill dismissed (a).

(a) See the cases collected in the Editor's note to *Rick v. Jackson*, post, vol. iv. 519.

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BALWYN v. JOHNSON.

Executors divide a part of their testator's property, but lodge a sum in the funds for securing the payment of an annuity; as to this they are joint-tenants, and it shall survive upon the death of one to the other.

THIS bill prayed that the defendant *Johnson* might transfer the sum of £500 four *per cent.* annuities into the names of himself and the plaintiffs, or such other person as the Court should think proper, that the same might be secured, so as to answer the annuity of £20 to *Mary Stone* during her life, and that upon her death the plaintiffs, as executors of the testator *James Mayre*, who was joint executor in the will and codicil of *J. Harford*, might receive and enjoy the benefit of one *moiety* thereof. It stated, that the testator, *J. Harford*, by his will, dated 7th September, 1787, after devising all his real estates as therein mentioned, gave to *Mary Stone* an annuity of £20 payable out of his personal estate, and appointed the defendant *Johnson* executor, that he added a codicil thereto, whereby he appointed *James Mayre* joint executor with the defendant *Johnson*; that upon his death *Johnson* and *Mayre* proved the will and codicil, and possessed the testator's assets, and that, after payment of the testator's debts and legacies, there remained £500 four *per cent.* Bank annuities still standing in the testator's name, and which the bill charged was set apart to answer and pay the said annuity of £20 to *Mary Stone* during her life, and the dividends and interest have been accordingly paid to her. That the testator did not dispose of the residue, and that consequently the two executors became entitled thereto equally, share and share alike, and particularly to the sum of £500 subject to the annuity of £20; that *Mary Stone*, as the sole next of kin, had executed a *release* to the executors *Johnson* and *Mayre*.

That *James Mayre* is deceased, having by his will appointed the plaintiffs executors thereof, and they, as his representatives, claim one moiety of the said £500, subject to the payment of the annuity for the life of *Mary Stone*, insisting that the said *James Mayre* and *Johnson*, though they might have been joint-tenants of such residue, the same had been severed by the said *James Mayre* and *Johnson*, for that the defendant *Johnson* and the said

James

James Mayre did transfer £300 four *per cent.* Bank annuities, part of the residue of the testator's personal estate, to the defendant *Johnson*, and the like sum, other part of such residue, to the said *James Mayre*, and also £350 *East India* annuities, other part of the residue of the testator's personal estate to the defendant *Johnson*, and the like sum, other part thereof to the said *James Mayre*; and therefore that the said *James Mayre* and the defendants were entitled to the said £500 four *per cent.* Bank annuities, as tenants in common, in consequence of such severance.

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Mr. Solicitor-General.—This joint-tenancy has been severed by the transfer of several parts of the residue of the defendant *Johnson* and *Mayre*; being distributed in *equal shares* between the executors, who likewise joined in appropriating this sum of £500 for this annuity of £20 to *Mary Stone*. These circumstances clearly amount to a severance; and the plaintiffs have a right to have this fund secured for his benefit, subject to the annuity of *Mary Stone*.

Lord Chancellor.—You come to divide this sum because you have divided the other parts of the residue. There is nothing in it, I must dismiss the bill with costs.

Mr. Lloyd, on the other side.—As to the severance of the whole residue, that cannot extend to this £500 as nothing more was done than to let it continue in the testator's name for the payment of the annuity: where two joint-tenants have made a division of some part of the property that act cannot make any alteration or amount to a severance as to what may still remain. *Willing v. Baine*, 3 P. W. 113. there the Court held it to survive, except as to what had been actually divided. *Frewen v. Relfe*, (ante, vol. ii. p. 220.)

Lord Chancellor.—It seems to have been the mutual wish of both parties to run the hazard of survivorship as to this sum of money.

Mr. Solicitor-General.—The difference between the cases cited and this is, that here the executors did actually divide all they could *possibly touch*; they were obliged to let *this sum* remain to answer the annuity; every sixpence capable of division was divided. There is a clear equity to sustain the bill, if it is for nothing more than to secure this annuity, though we cannot deny that the *annuitant is not a party*, 4 Bro. P. C. 224 (a). is a strong case of severance, Cro. El. 33. 1 Salk. 158. This £20 a year is a charge upon the whole residue, and the executors leaving this

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(a) This is the case of *Hall v. Digby*, Ed. Toml. ib. 577, the only proof of severance was, the joint-tenants having let out a vessel to freight.

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sum to answer the annuity affords a strong circumstance of intention to shew they did not mean it should survive: it is stated in the answer that this sum was so appropriated by them.

Lord Chancellor was then inclined to direct the fund to be paid into Court, and that the annuity should be paid to *Mary Stone*, with liberty to the parties to apply upon her death; but, after some opposition from Mr. *Lloyd*, he at length dismissed the bill with costs (a).

(a) The question of severance was very elaborately discussed by Lord *Elton*, in *Jackson v. Jackson*, 9 Ves. 591, in which his Lordship, upon an appeal from a decree at the *Rolls*, 7 Ves. 535, was of opinion, that though the residuary legatees took as joint-tenants leasehold and personal estate embarked in trade, yet that upon all

the circumstances, and the transactions of twelve years, a severance was to be implied. Vide also *Smeaton v. Burton*, 15 Ves. 370. For the cases upon the subject of executors taking as joint-tenants, vide *Perkins v. Bayntun*, ante, vol. i. 118. and *Frewen v. Relfe*, ante, vol. ii. 220. *White v. Williams*, 3 Ves. & Bea. 72.

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1 Ves. jun. 236.

Where there is a separate commission against one of two partners, the assignees having taken possession of the partnership effects, must divide them among the joint creditors: and the separate bond creditors of the other partner cannot claim a moiety of the effects until after payment of the joint creditors.

HANKEY v. GARRATT.

WOOLDRIDGE and *Kelly* were partners in trade, and failed in 1777, and *Kelly* then resided in the *Danish* island of *St. Thomas*, a commission of bankruptcy was issued, dated 10th July, 1777, against *Wooldridge*, by the description of *Thomas Wooldridge*, of the *Crescent*, *London*, merchant, in partnership with *Henry Kelly*, late of the same place, merchant: *Holland Pope* and *John Hawkins* were chosen assignees. *Pope* died soon after, and *Hawkins* became insolvent in 1779. In 1780 the defendants *Garratt* and *Rowlatt* were chosen assignees, and received from *Pope's* representatives and from *Hawkins* a considerable sum of money arising from the joint property of *Wooldridge* and *Kelly*.

Afterwards an action was brought against *Kelly*, on which he was outlawed, and a joint commission was issued against both, (though *Kelly* was abroad, and had committed no act of bankruptcy) but this outlawry was afterwards reversed, and the commission superseded.

The assignees having in their hands about £3,000 or £4,000; in April 1784, and in December 1787, petitions were presented by joint creditors, praying for a dividend; in consequence of which, and an order for that purpose, the commissioners ordered a dividend of 1s. in the pound to be paid out of the separate effects of *Wooldridge*, and out of a moiety of the joint effects of *Wooldridge* and *Kelly*; but refused to divide the other moiety of

of the joint effects, conceiving that the jurisdiction did not extend to it.

A few months after, the assignees having received between £2,000 and £3,000 more, another petition was presented for the purpose of obtaining *Lord Chancellor's* order for the division of the whole, which came on to be heard in *January* 1789, when his Lordship being of opinion that he could not make such order on a petition, recommended that a bill should be filed, and dismissed the petition (a).

In consequence of this the present bill was filed 31st *January*, 1789, and after several delays and answers put in, exceptions taken, &c. final answers came in 20th *January*, 1790, by which they admitted the sums come to their hands, but with respect to the uses made of them from time to time, which was particularly interrogated to in the bill) *Garratt* admitted the money in his hands had been lent to his partners, and that he was paid interest for it at five *per cent.* to the amount of £695. 11s. 9d. *Rowlatt* said he had also lent the money he received to his partnership, but had been paid no interest for it.

After the original bill filed *Kelly* died, leaving his sister Mrs. *Wooldridge*, the widow of *Wooldridge*, who was also dead) his nearest relation, who administered to him; and the bill being amended, and she made a party, by her answer claimed the property in question, as his representative, and also as a bond creditor.

The cause coming on to be heard in *Michaelmas* term, 1790,

Mr. *Hardinge* for the plaintiffs.—There are two questions:

First, Whether the assignees can compel the administratrix to pay the joint estate to them?

Second, Whether a separate bond creditor can come in before the joint creditors are paid?

In the present case the joint estate has been applied by the assignees for their own benefit. This is a clear ground for interest at the usual rate, for it has been determined, that wherever trustees have made use of trust money, they shall pay interest for it at the usual rate, without reference to what interest they have actually made: and the delay used in this case will be a sufficient reason for the defendants to pay the costs.

The assignees objected to any dividend beyond the moiety of the joint effects; the bill prays a division of the whole fund.

Here is a joint fund got into the hands of separate assignees; out of whose hands it cannot be taken but by the joint creditors.

(a) Mr. *Cooke* notices two other cases in which this was refused to be done upon petition, and a bill was directed

to be filed. But it is now the constant practice to order this arrangement on petition, Co. B. L. 7th ed. 256.

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Mrs. *Wooldridge* claims it for the purpose of paying *Kelly's* separate creditors; so that it is a question between the joint and separate creditors. It so happens that one of the separate creditors is administratrix; but the only effect that it can have is between her and the other specialty separate creditors.

Then it is *Kelly*, by his administratrix, claiming against the joint creditors.

What is a partnership? Partners are joint-tenants of the joint fund, the consequence is, that one can retain the whole fund; the one has no claim on the other but upon the settlement of accounts. *Fox v. Hanbury*, Cowp. 448. *Smith v. De Sylva*, Cowp. 469.

Suppose *Wooldridge* had paid the joint debts out of the fund, *Kelly* could not have recovered but on an account.

As between a surviving partner and the representative of the deceased partner, the survivor at law has the whole right, though he is a trustee: but he acts fairly if he pays all the joint debts, and pays over a moiety of the surplus.

Here the assignees are tenants in common of one moiety, and by chance, they have the other moiety in their possession, but they must pay it to the joint creditors, as appears by the principles laid down in *West v. Skip*, 1 Ves. 242. There is no case in the books in point with this, but the principle is laid down in several cases. In *Goss v. Dufresnoy*, stated 1 Cooke's Bankrupt Law, 289, the partnership debts were ordered to be first paid.

Mr. *Solicitor-General* and Mr. *Mansfield* (for the assignees).—The commission was to all intents a separate commission, but joint debts were proved under it.

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Kelly's moiety of the joint fund is a fund not to be distributed under the bankruptcy. If *Kelly* had received the moiety, and paid separate creditors with it, the payment would be good.

There is a real difficulty, in this case, as to *Kelly's* moiety of the fund. The assignees have distributed the moiety among the creditors, but did not think themselves entitled to distribute the remaining moiety during *Kelly's* life. It was *Kelly's* money in their hands, and he could not have made them pay interest, as they were only his simple-contract creditors. They were persons not interested (being not even creditors) appointed by the creditors to get in the fund, and have kept the money by necessity; they ought not therefore to pay interest; and as the suit was made necessary by the doubts entertained, they should not pay costs.

Mr. *Graham* rising on behalf of Mrs. *Wooldridge*, the administratrix, Lord Chancellor stopped him, saying that the point would be reserved to him, whether the separate creditors were first

st to be paid out of the moiety before the joint creditors. His Lordship said, that where one partner is solvent and the other bankrupt, the assignees can do no justice without dividing the joint estate among the joint creditors; for they are joint-tenants of the whole, if they can get it in.

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It was referred to the Master to take an account of the joint estate of *Wooldridge* and *Kelly*, and of the separate estate of *Wooldridge*, come to the hands of the defendants the assignees, and to the hands of the defendant *Susannah Wooldridge*, as administratrix of *Kelly*, and to inquire whether the respective partnerships of the defendants *Garratt* and *Rowlatt* had paid them any interest for such parts of the estate of *Wooldridge* and *Kelly* as came to their hands, and that they should be charged with such interest, and that the Master should compute interest at four per cent. on the rest of the money which came to their hands from the time of their receiving the same; and the Master was to inquire what creditors had sought relief under *Wooldridge's* commission, and which of them were joint creditors, and whether any of the joint creditors had not proved, and his Lordship declared, that the joint creditors of *Wooldridge* and *Kelly* were to be considered as creditors on their joint estate, and that the assignees should pay the £3,166. 14s. 4d. admitted to be in their hands, into the Bank, and the same should be laid out in trust in the cause; and reserved further directions till the Master should have made his report.

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Upon the 29th November the Master made his report, and hereby certified that he had taken the accounts as directed; and that it was admitted before him, that there had come to the hands of defendants *Garratt* and *Rowlatt*, of the joint estate of *Wooldridge* and *Kelly* (including a sum of £450. 18s. 5d. arising from the separate estate of *Wooldridge* as after mentioned) the sum of £6,764. 1s. 5d. and that they had expended, on account of the joint estate, sums amounting to £3,199. 13s. 2d. which left a residue in their hands of £3,564. 8s. 3d.; and that it was admitted there had come to their hands of the separate estate of *Wooldridge* the sum of £450. 18s. 5d. which made part of the money received by the defendants from *Pope* and *Hawkins*, the former assignees of *Wooldridge*, and which had been divided among the creditors who had proved under *Wooldridge's* commission, and that there was not any thing remaining in the hands of the defendants *Garratt* and *Rowlatt*, of the separate estate of *Wooldridge*, except five Treasury orders of £100 each, bearing an interest of £3. 10s. per annum, taken in pursuance of the acts for giving relief to American sufferers, to *Susannah Wooldridge*, and the defendants *Garratt* and *Rowlatt* jointly; and that the defendant *Susannah* had not in her possession any part of the joint or separate estate. He then found that defendants *Garratt* and *Rowlatt* had, on the

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15th *March*, 1791, paid the sum of £3,166. 16s. 4d. into the Bank (which had been laid out in the purchase of £3,897. 12s. 6d. Bank three *per cent.* annuities), and which being deducted out of the balance in their hands, the same was reduced to £397. 11s. 11d.; and it was admitted before the Master, that the partnership in which the defendant *Garratt* was concerned had paid him interest for such part of the joint estate of *Wooldridge* and *Kelly* as had come to his hands £695. 10s. 9d. which was all the interest made by defendant *Garratt* of the joint estate at the time of paying the money into the Bank; and that the defendant *Rowlatt* had been paid from the copartnership in which he was concerned, for interest on such part of the joint estate as had come to his hands, £309. 19s. 10d. which was all the interest made by him at the time of the payment made into the Bank; and he certified that he had computed interest on the remaining sum of £397. 11s. 11d. the balance in the hands of the defendants *Garratt* and *Rowlatt*, from the 3d of *March* to the 29th *November*, and the same amounted to £11. 14s. 8d.; and that he had, in the third schedule to his report, set forth an account what joint creditors had proved under *Wooldridge's* commission, and the sum proved by each, and the dividend paid to each, and that one person only who had not before proved, *Andrew Verrier*, had come in before him, and proved a joint debt of £22. 19s. 6d. and that no sums of money (except the dividends) had been received by the said joint creditors.

The cause came on for further directions on the Master's report, on the 8th *February*, before Mr. Justice *Buller*, sitting for the *Lord Chancellor*, when

Mr. *Graham* shortly argued, on the part of Mrs. *Wooldridge*, that she was entitled to a priority with respect to the second moiety of the joint estate, and that the assignees could only divide one moiety among the joint creditors; but

Mr. Justice *Buller* thought the assignees must administer all the joint effects in payment of the joint creditors, and that Mrs. *Wooldridge* had no priority against them, and therefore referred it back to the Master to tax all parties their costs, and ordered the £3,897. 12s. 6d. standing in the name of the Accountant-General in trust in the cause to be sold, and that the money to arise from the sale, together with the cash in the Bank, and the interest upon the £3,897. 12s. 6d. until the sale, should be paid to the defendants *Garratt* and *Rowlatt*, the assignees, who were to apply the same, together with the £1,408. 17s. 2d. reported due from them in payment, first of the costs, and then to divide the residue *pari passu* among the creditors named in the third schedule to the Master's report, and to *Andrew Verrier*, a creditor

who had proved a debt before the Master; and by consent agreement with the creditors, it was ordered that the five shares mentioned in the report to be in the hands of the assignees, should be delivered up to the defendant *Susannah Woolley* (a).

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This equity had been established in a very early case, *Richardson v. G.*, 2 Vern. 293. Lord Eldon, in *v. Goodair*, 11 Ves. 85. alluding to the practice in bankruptcy, permit execution even by a creditor, but to distribute the effects even in the absence of the partner, observed, that a case had often occurred, whether a rate creditor taking a moiety of chattels in execution, may call for one of that chattel and divide the same; or whether the Court would impose upon him the whole account of the partnership, permitting him to satisfy that interest which the partner debtor would have been entitled to after the account. The extensions in which this doctrine was given by the Court of Exchequer, in *or v. Fields*, 4 Ves. 397, seems to embrace this and every other question of the sort which may arise. It is said, that, whether a person for his consideration sells his interest in a partnership trade, or his next of kin takes it upon his death, or a partner takes it in execution, or a partner takes it under a commission, the law makes no difference; but in all

those cases the application of the rule takes place, that the party coming in the right of the partner, comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership and the partner, and it is an item in the account, that enough must be left for the partnership debts. In *Parker v. Pistor*, and *Chapman v. Keops*, 3 B. & P. 288, 289. it was attempted, on the authority of that case, and of *Eddie v. Davidson*, Dougl. 650. to compel plaintiffs who had taken partnership goods in execution, to enter into the account between the defendant and the other partners, before they should have the fruits of the execution; and it was said, that the Court of King's Bench, on a similar application, had driven a plaintiff to consent: but the Court of Common Pleas refused to interfere with the assertion of the fair common law right. See upon the subject of joint and separate estates, *Ex parte Hodgson*, ante, vol. ii. 5. *Ex parte Champion*, ante, 440. *Anderson v. Maltby*, post, vol. iv. 423.

(a) *ISAACS v. HUMPAGE and Others.*

The defendant *Humpage*, an apothecary, brought an action against *Rowley* and *Hogarth*, as executors of a Mr. *Sharpe*, deceased, for medicines administered to and attendance upon their father. *Hogarth*, one of the executors, defended the action, appeared by counsel; *Rowley* did not appear, and the plaintiff recovered a verdict, with £500 damages; the plaintiff, as residuary legatee in the testator's will, filed the present action against *Humpage*, *Rowley*, and *Hogarth*, charging that the sum had been recovered by collusion and fraud between *Humpage* and *Rowley*, and praying to be let in to try the merits of the

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S. C.

1 Ves. jun. 427.

Mr. J. Buller,
for Lord Chan.

Affidavits read,
upon an application for an injunction to restrain execution on a verdict at law after answer put in.

(a) Reg. Lib. A. 1791. fol. 162. nom. *Isaac v. Hogarth*.

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case,

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case, and for an injunction to restrain further proceedings in consequence of the verdict. The answers were come in.

Mr. *Solicitor-General* moved for an injunction, and stated it as a gross case of fraud and collusion, by which alone the verdict could have been obtained, and proposed to read affidavits to prove his case.

Mr. *Richards* opposed this, insisting that there was only one case in which affidavits could be read against the defendant's answer, in order to obtain an injunction; that was the case of waste, and to shew this he referred to the case of *Lady Stathmore v. Bowes*, (ante, vol. ii. p. 88.) The answer must be taken *pro hac vice* to be true, and nothing can be read but out of the answer.

Mr. *Solicitor-General*, Mr. *Mitford*, and Mr. *Stanley* on the part of the plaintiff, and Mr. *Mansfield* on the part of Mr. *Hogarth*, contended that the affidavits ought to be read; that this was different from the common case where a person who brought an action at law was afterwards made a defendant in equity; in which case, on an application for an injunction after answer, nothing could be read but out of the answer: but, in this case a fraud was charged between *Humpage* and one of the executors to defeat the justice of the case under the form of a legal enquiry, and the trial at law was a part of the fraud charged. It is a bill by the residuary legatee, complaining of a fraud in the executor, by which his residuary fund will be diminished; and therefore rather resembles the case of waste, in which the affidavits have been allowed to be read. They cited Mr. *Cox's* note of *Strathmore v. Bowes*, 3 P. W. 255 a. (where other cases are cited, in which the same thing has been done) to shew that it was Lord *Kenyon's* opinion that they ought to be read, and that he would have ordered them to be read if the parties had not consented. So in *Chamberlyne v. Dummer*, (ante, vol. i. p. 166.) the affidavits were read; and the same in a case of *Charlton v. Parnther*, 26th March, 1753, relative to a partnership. Also in *Robinson v. Lord Byron*, (vol. i. p. 588.) where the bill was to restrain Lord *Byron* from letting a greater quantity of water than usual flow upon a mill, affidavits were read against the answer. *Cole v. Gibbs*, 3 P. W. 285, was the case of a patent invention, where affidavits were read against the answer. The plaintiff, in the present case, if he cannot have an injunction, will be driven to charge *Rowley* with a *devastavit*. If the money once gets into the hands of the plaintiff at law, the decree hereafter, in favour of the present plaintiff, may be useless.

Mr. *Graham* and Mr. *Richards* for the defendants.—There is nothing in this case to take it out of the general rule. The only
cases

cases where affidavits are permitted to be read are cases of waste, or similar cases to waste, namely, where irreparable injury would be done if the Court did not interfere, as in the case of patent inventions. In the case of waste the injunction is granted on proof of title, and on affidavit of waste; there the Court, having granted the injunction on affidavits, will, upon the shewing cause, look back to the affidavits on which the rule was granted, but will it admit of affidavits being read against the answer? So in the case upon the partnership, the suggestion was that the partner was insolvent, and that irreparable damage would ensue if the Court did not interfere. This is an action by *Humpage* against the executors of *Sharpe*. Is there a pretence, that if a verdict should go against them, there will be irreparable damage? It does not appear that they are insolvent. Is there any thing like waste? If, on the hearing they prove the collusion, they must bring back the money that has, against conscience, been recovered at law. In the cases of waste and patents there could be no relief if the injunction did not go.

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Mr. Justice *Buller*.—The objections against reading the affidavits are not entitled to any favour, it being only for delay; whether the question is tried now on the affidavits, or by and by, at the hearing of the cause, the difference is only the chance of the plaintiffs losing the money; but if in the common case, the affidavits cannot be read, they must not in this. And it is said, that in the common case, nothing can be read but what appears on the face of the answer; but, certainly there are cases where that rule does not prevail; waste is one of these, and the ground of the exception is, that an irreparable mischief would ensue, and that the Court will prevent that irreparable mischief by its interposition. The present case is very like that. Here is a demand of the specific thing—the assets of the testator. That is a difference between courts of law and of equity; courts of law only affect the person of the defendant, courts of equity bind the assets themselves. The plaintiff here says, the defendants are by collusion wasting the assets of their testator, to which he is entitled. That brings it within the case of waste. So in the case of patents, it will not remain the same at the trial. It is a reason for going out of the common course, because the plaintiff would be injured by the exercise of the right in the mean time. In (*x*) *Robinson v. Lord Byron* the Court granted the injunction upon the same reason, on reading affidavits. But another reason the plaintiff proceeds upon is fraud; and in case of fraud an immediate interference is necessary, and therefore it being such a case, the affidavits must be read (*a*)

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Upon

(*x*) *Robinson v. Byron* was a case of waste.

(*a*) It has been often attempted to support this decision on the ground of fraud, but it has been so repeatedly shaken, that it may be considered as entirely

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Upon reading the affidavits, and they making out a very strong case, Mr. *Humpage*, the plaintiff at law, being present, consented to a new trial.

entirely over-ruled, *Lane v. Williams*, 6 Ves. 798. *Hanson v. Gardiner*, 7 Ves. 308. *Berkeley v. Brymer*, 9 Ves. 355. *Norway v. Rowe*, 19 Ves. 148.

In injunctions to stay proceedings at law, it is repugnant to the whole course of practice, to receive affidavits in contradictions to assertions positively made by the answer. But the Court has admitted affidavits to be read in support of allegations made by the bill, where these allegations related to acts of the parties, and the defendant by his answer, neither ad-

mitted nor denied the truth of them, *Morgan v. Goode*, 3 Meriv. 10. So letters set forth by the bill, and not admitted by the answer, were permitted to be verified by affidavit, *Targart v. Hewlett*, 1 Meriv. 499. and in *The Attorney-General v. Elliot*, 2 Price, 48, under very peculiar circumstances, an affidavit was permitted to be read, to supply certain omissions in the bill. As to admitting affidavits in cases of waste, in opposition to the answer, vide the Editor's note to *Lady Strathmore v. Bowes*, cit. sup.

Mr. J. Buller,
for Lord Chan.

WORLIDGE v. CHURCHILL and Others,

Testator leaves a residue in trust for four, with survivorship. Two die, the survivors shall survive as well as the original shares.

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EDWARD WORLIDGE, the plaintiff's father, seised of estates in fee-simple, and possessed of personal estate, made his will, dated 19th August, 1772, and thereby gave unto *Mary Worlidge* an annuity of £150, and also gave to the defendants *Churchill* and others all his real estates, and also all his personal estate, on trust to sell the same, and the monies arising therefrom, after payment of his debts, and retaining so much as should be sufficient to purchase such annuity, to lay out the same in government security, in their names, in trust, and for the benefit of *Rosalba Worlidge*, plaintiff, *Edward Worlidge*, *William Worlidge*, and *John Worlidge*, to be equally divided amongst them on their attaining the ages of twenty-one years; but if any of them should happen to die before attaining such age of twenty-one years, then such deceased child's share to go to the survivors or survivor of them; and he directed the said trustees to apply the interest of such trust money, during their minority, for and towards their maintenance and education; but if the interest should be more than sufficient for such purpose, then he directed the trustees to lay out the same for the said children's mutual benefit; and in case all the said four children should happen to die before attaining the age of twenty-one years, and leave *Mary Worlidge* living, then he directed the trustees to pay her the interest of such trust money from time to time as it should grow due; and after the decease of all, he gave and bequeathed the said trust money to the children of his late uncle, Mr. *Stephen London*, to be equally divided among them, share and share alike, with power to the trustees to put the sons apprentice,

apprentice, and provide apprentice fees, and made the trustees executors.

Testator made two codicils immaterial to the present question.

John, one of the children, died in the life-time of the testator.

William Augustus (in the will called *William*) died in *February* 1783, an infant aged about seventeen, intestate and without issue, and the defendant *Townshend*, having obtained letters of administration, was his personal representative.

Rosalba died in *July* 1786, an infant about eighteen, but made a will disposing of such estate and effects, of what nature, &c. as she became entitled unto, and vested in her in consequence of the decease of her late brother *John William* in the life-time of her father, and after the decease of her late brother *William Augustus Worlidge* by virtue of the will of said *Edward Worlidge*, or otherwise howsoever; "and also her estate and effects whatsoever which she might be possessed of or entitled unto, and which she had a right to dispose of," and made the defendant *Porter* executor of such will.

The plaintiff filed his bill against the executors for an account, and prayed *inter alia*, that the representatives of *William Augustus* and *Rosalba* might set forth their claims.

The defendant *Townshend*, by his answer submitted, that he was entitled, as representative of *William Augustus Worlidge*, to such share as his intestate would have been entitled to.

The defendant *Porter*, as executor of *Rosalba*, insisted that *John* having died in the life of the testator, one fourth part of the money arising from the sale of testator's estates, to which *John* would have been entitled had he survived testator, and attained twenty-one years of age, upon decease of testator, accrued to plaintiff and said *Rosalba* and *William Worlidge*, and the interest therein became vested in them immediately and upon the decease of *William*, an infant under twenty-one, his share also in testator's estate vested immediately in plaintiff and *Rosalba*, in equal proportions, and therefore claimed the same, subject to the trusts of her will.

The cause coming on to be heard (11th *February*, 1792) before Mr. Justice Buller, sitting for Lord Chancellor.—Mr. Solicitor-General, Mr. Mitford, and Mr. Richards (for the plaintiffs) argued, that although the general rule had been, that where there were not particular words used for the purpose, surviving shares would not survive again; but that, though the original shares should go over, those which accrued by survivorship would be vested interests in the children dying, and transmissible to their representatives; yet that the rule had been much blamed and disapproved of by the Court: that in the case of *Pain v. Benson* and *Palmer*, 3 Atk. 78, Lord Hardwicke had availed himself of the particular circumstances

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of the case to determine in contradiction to the rule. That the present *Lord Chancellor*, though he acknowledged the existence of the rule, expressed his disapprobation of it in the case *Ex parte West*, (ante, vol. i. p. 575.) There it was a gift to *A*, *B*, and *C*. of £1,000 each at twenty-one, not a gift of £3,000 to be divided among them; *A*. died, and then *B*. died; the question was, whether the part of *A*'s legacy, which had survived to *B*. should survive again to *C*. or only *B*'s original share so survived. Mr. *Maddocks* then cited the case of *Rudge v. Barker*, For. 124. *Lord Chancellor* thought the word *share* would mean all the party took under the will, and would take in the survived as well as the original share; but did not care to overturn the decisions sitting in bankruptcy, where he could have no opportunity of reconsidering his opinion; at the same time saying, that if the parties would bring it before him in a more solemn way he would give it more consideration. It is true that in that case a bill was filed, and set down before *Lord Kenyon*, who decreed that the surviving share did not survive; but that was because he did not see sufficient in the particular will before the Court to vary from the general rule. But there the legacies were three separate and distinct legacies, and the words were, "in case any of them should die," not, as in this case, one aggregate sum to be divided among three persons at twenty-one. The case of *Pain v. Benson* shews how ready *Lord Hardwicke* was to take the case out of the rule, and *Lord Thurlow* approved of his readiness so to do, though he did not think the circumstances of the case furnished such a distinction upon the will before the Court. There can be very little doubt as to the testator's intention: It is a trust by sale of real and personal estate to constitute an aggregate fund, which is given, in the entirety to the trustees, and it is not to receive a divisible quality till the legatees attain twenty-one years of age; and if any of them die before, the share of such deceased child is to go to the survivors, the interest is to be applied for maintenance, and if it proved more than sufficient, the surplus was to be disposed of for the benefit of all. The clause giving it over in failure of all the children is decisive of the testator's sense, for nothing was to go over unless all died; it was clear therefore, that if one died, he meant the others to take the whole, and that if all but one died, the whole should go to that one survivor. Another circumstance in this case is, that one of the children died in the life of the testator, and wherever a legacy is given to persons with benefit of survivorship this Court has considered it as a remainder. The old rule seems to have been founded on the case of *Woodward v. Glassbrooke*, 2 Vern. 388. which went on the strictness with which devises of real property are considered; but even there if there had been additional words, that if all had died it should go to *A*. they would have raised a different construction. But what furnishes a distinction in this case is, that in almost all the decided cases the legacies

legacies were distinct, that was the case in *Perkins v. Micklethwaite*, 1 P. W. 274. in *Rudge v. Barker*, Cas. Temp. Talb. 124. in *Barnes v. Ballard*, cited 3 Atk. 79. and *Scoolding v. Green*, Pre. Ch. 37.

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Mr. Selwyn and Mr. Jones for the defendant *Porter*, the executor of *Rosalba*:—

Rosalba gave all that accrued to her by survivorship to the defendant *Porter*; she claimed one third of the share of *John*, who died in the life-time of the testator. It appears by *Willing v. Baine*, 3 P. W. 113. that his legacy was vested; in that case two cases are cited from *Vernon* that prove the same position.

Mr. Justice *Buller*.—No; *John* could take no share, the will must stand as divided among three.

Mr. Selwyn and Mr. Jones.—If she could not claim any share from *John* she claimed one half of the share of *William* with the plaintiff. That was an accumulated share, and, according to the cases, could not survive over again. It is fully decided in *Perkins v. Micklethwaite* that, in these cases, the surviving portion is a vested interest in the surviving child; and in this case there are no words to create a joint-tenancy. It is the well known practice of skilful conveyancers to introduce words to make such interests survive again; which shews their opinion, that without such express words, they would not do so; and it appears from the case in 3 Atk. that the survived share has always been considered as being in the nature of a new legacy. On the petition *Ex parte West*, Lord *Thurlow*, though he was sitting in bankruptcy, gave the subject great consideration, and determined that the survived share could not survive; and Lord *Kenyon*, when that case came before him, said it would be too much to extend the words, by mere conjecture, beyond the common meaning. In *Ferguson v. Dunbar**, 7th May, 1781, Lord Chancellor had decided the same thing.

* *Ferguson v. Dunbar and others*, 7th May, 1781. *William Dunbar* devised to plaintiff, his executor, so much of his personal estate as would purchase an annual sum of £550, which he gave to his wife for her life, and he directed the principal, after her decease, to be paid to his children; that is to say, one half to his son *George*, and the other half to his daughters *Elizabeth* and *Charlotte* equally, if living at the death of their mother; and if any of them should die in the life-time of the mother, leaving issue, he gave that share to the issue of such child or children equally, at the age of twenty-one years, or day of marriage: but if any of them should die before the age of twenty-one years, without issue, he gave that share to the survivors, and if all of them should die without leaving children, then he directed the same to fall into the residue of his personal estate; he gave his daughters £8,000 each, and appointed his son residuary legatee. *Charlotte* married *Richard Mitchell*; afterwards the mother died: and *Charlotte* died, leaving two daughters by *Richard Mitchell*, who were defendants to the bill, which was brought by the executor to have the trusts of the will carried into execution, and to be discharged on account of his great age. After the death

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thing. But it is said there is a difference between this case and that of distinct legacies. We never heard of such a distinction; if there be, the words here are such as to make the legatees tenants in common, which makes it the same thing as if they were distinct legacies. In this case also the interest is appointed to be applied to the maintenance and education of the children, that circumstance vests the legacies, *Fonnereau v. Fonnereau*, 3 Atk. 645. As to the last clause, that does not *ex vi termini* apply to the whole, but to the last unvested share.

Mr. Justice Buller.—There are cases in which the Court finds that, in its decisions, it has not followed the intent of testators, as in the case where freehold property is given to the devisee generally, without words of limitation, the Court will not vary from the legal rule; but if it is clear the testator meant to give the devisee an absolute interest the Court will raise a fee.

This is a case of the same kind; the Court has thought itself bound to decide according to the rule of law, though the construction was against the intention of the testator, as it was in the case *Ex parte West*, where the gift was of a distinct legacy.

It is impossible to express a greater dislike to a rule than Lord Thurlow expressed in that case; and he ended with an intimation to the parties to bring the case before him again. He was of the same opinion when he decided *Ferguson v. Dunbar*; he was desirous to catch hold of the circumstances to take the case out of the rule.

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The language that has been used on these subjects, is not easy to account for; in *Rudge v. Barker*, it is said by the Master of the Rolls, that, whatever the intention of the testator might be, the Court must judge on the words of the will. That expression is not accurate; the Court must go upon the words of the will, to discover the testator's intention; but, if the intention is apparent, it must be pursued.

The distinction as to their being distinct legacies, is rather a nice one, but not so nice as not to be regarded; in *Rudge v. Barker*, it is said, "had they not been distinct legatees, it might have been another question;" that shews the rule was not thought to apply to an aggregate fund.

If this were *res nova*, and there was a limitation to "survivors and survivor," no one could collect the intent to be otherwise than

death of Charlotte, Elizabeth died under age and without issue. The question was, whether the children of Charlotte were entitled to any part of the share of Elizabeth.

Lord Chancellor said, this was one of those cases in which he had the mortification to see that what was most probably the testator's intention could not be executed for want of his having been properly advised and having sufficiently explained himself; that he thought the testator meant the children should take the share which would have accrued to the parent if living; but not having said so, but limited such share to the survivors or survivor, he must declare George, as the only surviving child, entitled to the whole of Elizabeth's share; and decreed accordingly.

that

that the survivor should take the whole: but if the case had rested there, I should have thought it difficult to get over the objections.

But the strong part of the present case is, the testator's intention to keep it as an aggregate fund. He has made use, in two different parts of the will, of the words *trust money*; that expression does not apply to the share of each child, but to the whole fund in the trustee's hands, and takes in the whole fund, that is to be distributed under the will. The second place where he uses the expression, *trust money*, is in the gift over to the children of his uncle *London*; and though the expressions *the whole*, or *all*, are not used, the words *trust money* are tantamount to them. The plaintiff therefore is entitled to the whole fund.

And all parties must have their costs paid out of it (a).

(a) See a curious question upon this subject, *Vandergucht v. Blake*, 2 Ves. 534; vide also *Ex parte West*, ante, vol. i. 575.

MAY v. WOOD.

Rolls,
23d Feb.

THE testator gave, by his will, as follows, "I give to my daughters *Mary* and *Margaret*, the sum of £3,000, 5 per cent. Navy Annuities, and all the dividends and proceeds arising therefrom, to be equally divided between them, and all my estate at *St. Osyth*, to be equally divided between them, when they shall arrive at twenty-four years of age, and I give to my sons *Richard* and *John*, all the residue and remainder of my property and estate, bond debts, mortgages, annuities, &c. to be mutually and equally enjoyed by them;" and he appointed *R. Sterling*,—*Talman*, and *Thomas Wood*, executors of his will.

A legacy to daughters equally to be divided between them, when they arrive at 24 years of age, is vested immediately, and only the time of payment postponed.

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One of testator's daughters married the plaintiff *May*, and died, after she attained twenty-one, but before she arrived at twenty-four years of age, the period mentioned in the above clause.

The bill was filed by the plaintiff, *May*, against *Thomas Wood*, the surviving executor, and other parties residuary legatees, insisting, that a moiety of the said £3,000 was a vested legacy, and that, notwithstanding, his wife had died under twenty-four years of age, it was transmissible to him, as her representative.

Master of the Rolls.—The question arises upon the clause in the testator's will, containing the gift of the £3,000, Navy Annuities, to his daughters, *Mary* and *Margaret*. I must confess, that I have never entertained a doubt, as to the point, conceiving it to be perfectly settled in respect to principle, as well as construction; the only reason for deferring my judgment, was for the purpose of

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of looking into the case of *Love v. L'Estrange*, 3 Bro. P. C. 337. cited in *Monkhouse v. Holme*, (ante, vol. i. 298. which comprehends all the authorities upon this point, as to pecuniary legacies,) which is adverted to by Lord *Loughborough*, as having been determined, upon the ground of its being a residue. One does not know, upon ground the judgment of the Lords might be founded, but upon the statement of the case, it does not seem to warrant that observation; it not being, as I can discover, insisted upon by counsel on either side, in the case stated by them. So that it may be considered, as a determination upon a general pecuniary legacy, and to fall within the reasoning of the authorities upon this subject. It has been contended, upon the part of the plaintiffs, that, according to the rule established in all former cases, this legacy must be considered as vesting in *presenti*; and the period of *twenty-four years annexed* to it, is not a condition, but the time when the party should be put into complete possession. All the cases establish this principle, that where the time is mentioned, as referring to the legacy itself, unless it appears to have been fixed by the testator as absolutely necessary to have arrived before any part of his bounty can attach to the legatee, the legacy attaches immediately, and the time of payment is merely postponed, not being annexed to the substance of the gift; but if it appears that the testator intended it, as a condition precedent upon which the legacy must take place, then if such condition or contingency does not happen, the gift never arises. It has, therefore, been insisted by the defendant's counsel, that the word *when* must be considered as synonymous to *if*; it is universally so, where the word *if* is used, as denoting a condition annexed, and therefore in such a case, the legacy cannot take place. Here the words are, *to be equally divided when they shall arrive at twenty-four years of age*; the latter words relate to the whole of the preceding sentence, and it is not for me to consider, whether the words "to be equally divided" make any difference, and I do decide this point without any reference to those words. *Atkins v. Hiccocks*, 1 Atk. 500. has been cited upon the part of the defendant; and, from that authority, it seems clear, that if it had not been for the circumstance of its being payable at the day of marriage (but at any other time,) Lord *Hardwicke* would have deemed it, merely as a postponing the payment of the legacy; but he considered the period of marriage as the essential requisite, and the very consideration for which the legacy was given; and as that time, namely the day of marriage, never arrived, his Lordship held it could not take effect. As to *Onslow v. South*, Eq. Ab. 295. there the words annexed the time to the substance of the legacy, being at *twenty-one*; and therefore the gifts never arose until the time actually arrived; and the word *now* was much relied upon; but surely it could not amount to any thing more, than to describe the identity of the person. It has been argued, for the defendant, that the testator could never be said

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said to give the legacy, until the time actually came when he declares that the gift should take place. These have been *the cases relied upon*: and it has been also contended, that, according to the true construction of this clause, the word *when* must be synonymous to *if*, and consequently that the legacy has never vested. Has the Court ever adopted such a construction? On the contrary, all the cases, for full half a century, upon pecuniary legacies, have determined that word, not as denoting a condition precedent, but only marking the period when the party shall have the full benefit of the gift, except something appears upon the face of the will, to shew that his bounty should not take place unless the time actually arrived; and not where he has merely used the word *when* for the sole purpose of postponing the time of payment (a). *Roden v. Smith*, Amb. 588, has been cited for the plaintiff, which recognizes the general principle; but there, the question was, as to the payment of the legacy to the legatee's administrator, whether he should receive it immediately, or wait till it would have been payable to the party himself. The Court held that he could not be in a better situation than the legatee himself. As to *Love v. L'Estrange*, which I have before adverted to, I cannot approve of any distinction between a residue and a pecuniary legacy (b); the word *when* would apply equally to both cases, and therefore that case must be analogous to the present. A very strong authority has also been cited, as to the construction of the word *when* in respect of *realty*, from 3 T. R. 41. where Lord Kenyon construed this word in the same manner (c).

(a) Sir W. Grant, in *Hanson v. Graham*, 6 Ves. 243, expressed his doubt as to the correctness of this passage; observing that no case has determined that the word *when*, as referred to a period of life, standing by itself, and unqualified by any words or circumstances, has been ever held to denote merely the time at which it is to take effect in possession, but standing so unqualified and uncontrolled, it is a word of condition, denoting the time when the gift is to take effect in substance. He then proceeded to compare it to "if" of which the general meaning, as observed by Sir James Mansfield, 1 N. R. 324. implies a condition precedent. But in that as in other cases, these words have been considered as controlled by the general intent of the testator, *Branstrom v. Wilkinson*, 7 Ves. 421. *Lane v. Goudge*, 9 Ves. 225.

To the several cases upon real property, from *Boraston's case*, 3 Rep. 19. down to *Goodtitle v. Whitby*, 1 Burr. 228, and *Doe v. Lea*, 3 T. R. 41. which are all collected in Fearn, C. R. 241. at seq. in which words apparently im-

porting a contingency have been holden not to amount to a condition precedent, are to be added *Bromfield v. Crowther*, 1 N. R. 313. afterwards affirmed in the House of Lords, *Doe v. Moore*, 14 East, 601. *Doe v. Nowell*, 1 M. & S. 327. In one of those cases it was observed by Lord Ellenborough, (14 East. 604.) that the decisions upon legacies being founded in a great measure upon the doctrine of the civil law, were not applicable to devises of real estates.

(b) Lord Alcanley, in *Booth v. Booth*, 4 Ves. 408. alluding to this passage in the report, observed, "If I did say so, I spoke with too much latitude; for I then thought, and now think, there is a distinction, though in that case it made no difference." The cases in which the distinction between a residue and a particular legacy have been considered, are collected in the Editor's note to *Monkhouse v. Holme*, ante, vol. i. 300.

(c) For the general doctrine upon this subject, vide the Editor's note to *Dawson v. Killet*, ante, vol. i. 119.

Therefore,

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Therefore, I am of opinion, that, according to the true rule of construction, this word cannot be otherwise considered, than as denoting the period of payment, and must not be deemed as a condition precedent, upon which a legacy was to vest, but merely postponing the payment of this £3,000, with the dividends thereon, till twenty-four: and declare that the plaintiff, as the administrator of his late wife, is entitled to a moiety of the £3,000 5 per cent. Navy Annuities. The word *dividends* having been added by the testator, puts it out of question, whether he shall take it, *now* or *hereafter*, when his wife would have arrived at twenty-four, otherwise *Roden v. Smith* must have guided the Court upon this point, and I could not have said, that the administrator of the wife should have been put into a better situation than the residuary legatee, had not the word *dividends* been added; and therefore also declare the plaintiff to be entitled to all dividends due thereon, with costs out of the general fund.

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Lincoln's-Inn
Hall, 27th Feb.

SCOTT v. NESBIT.

The bidding on a lot sold in this court, may be opened upon a proper offer, even a second time, if the Master's report has not been confirmed; but shall not be opened at all after confirmation.

A MOTION was made, to open the bidding on the sale of a lot in this cause, the bidding upon which had been opened before. The offer of advance was considerable, and the report of the purchaser *had not been confirmed*. Mr. *Mitford* opposed the motion, on the ground, that it was unusual to open a bidding a second time, but Lord Chancellor did not conceive that to be an objection, as he saw no reason why it should not be opened a second time as well as a first; and granted the motion.

But with respect to another lot, although this was the first application, and the sum offered considerable (a seventh part of the purchase money) but the Master's report of the purchaser had been confirmed, his Lordship refused the motion (a).

(a) The doctrine upon this subject is collected in the Editor's notes to *Gower v. Gower*, 2 Eden, 378, and

Prideaux v. Prideaux, ante, vol. i. p. 287.

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HODGSON v. DAND.

Lincoln's-Inn
Hall, 1st March.

A MORTGAGE was made just before a bankruptcy, in which the nominal consideration was £200. Upon a bill to set it aside as fraudulent, the defendants stated in their answers, and evidence had been admitted at the hearing to shew, that though the nominal consideration was not the real one, nor any money paid at the time, yet the mortgage was given as a security for an old *bonâ fide* debt.

Bill dismissed
with costs, from
the coming in of
the answer.

Lord Chancellor dismissed the bill with costs, from the coming in of the answer; saying that, although the plaintiff might have good reason for filing the bill, for a discovery; when he had that, and found it a good defence, he ought not to have gone on.

STORRY v. HIGGINS.

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Lincoln's-Inn
Hall, 2d March.

BILL by two residuary legatees against a surviving executor.

Mr. Pemberton moved for a *ne exeat regno* against John Higgins, the agent of the person claiming to be the representative of the deceased executor — Higgins, on the ground that he had got into his possession a bond from one Palmer to the deceased executor for 300 and odd pounds, which was the security for the residue; and the affidavit stated, that the deceased executor paid one of the plaintiffs regularly the interest, as his share of the residue. No personal representative of the deceased executor was before the Court, there being a contest as to the representation, in the Ecclesiastical Court. The affidavit stated a declaration that he was going abroad.

No *exeat regno*
refused against
the agent of a
surviving exe-
cutor, having
in his possession
a bond which
was the security
for a residue to
which plaintiff
was entitled.

It had been moved at the Rolls, where his Honor was inclined to grant the writ, but was at a loss how to indorse it, as Higgins could not properly be said to be indebted to the plaintiff.

Lord Chancellor said—their ground was that Higgins was in possession of a valuable bond, which was the security for the plaintiff's share of the residue. If Palmer the obligor was the party, he would be indebted; but it was difficult to say Higgins was. That if he had possession of notes, the writ might be indorsed for the value; but that if he carried away the bonds, it would

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would not destroy the debt, but the plaintiffs might still recover. The bill must be amended by making *Palmer* a defendant.

Refused the motion (a).

(a) See Mr. Beames's observations also *Atkinson v. Leonard*, ante, 218, upon this case, Brief View, &c. 37; and *Cock v. Raric*, 6 Ves. 283.

Lincoln's-Inn
Hall, 2d, 5th
March.

PATRICK and Another v. HARRISON and Another.

Injunction to restrain defendants from negotiating a bill of exchange given for goods not delivered, issued on certificate of bill filed, and to be served with a subpoena.

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MR. Stanley moved for an injunction to restrain the defendants from negotiating or parting with, a bill of exchange, accepted by the plaintiffs, on the following circumstances:

The plaintiffs, by their broker, bought of the defendants a parcel of cotton wool: the custom of the trade is, to allow the purchaser fourteen days from the time of the contract to take away the goods, which are delivered on the purchaser's acceptance of bills of exchange at three months (or upon certain allowances, for ready money. On the 19th *December* last, being fourteen days from the date of the contract, defendants sent an account of the cotton, amounting in the whole to £1,150. 0s. 3d. for which the plaintiffs accepted a bill drawn at three months, and delivered it to the plaintiffs, in confidence that the lots of cotton would have been immediately delivered to them or their order; but notwithstanding application from the plaintiffs for that purpose, the defendants declined delivering either the cotton, or to re-deliver the bill of exchange.

The bill had been filed two days (as appeared by a certificate) before the motion made, but the subpoena had not been served.

Mr. Stanley submitted to the Court, that this was within the reason of those cases, in which injunctions have gone immediately upon filing the bill: namely, where *irreparable injury* may be done by the defendant's doing the act enjoined; as in the cases of *waste*, of *pirating books*, or *infringing patents*. That here, in case the defendants should negotiate the bill, the plaintiffs could make no defence against it in the hands of a *bonâ fide* holder, and therefore they would be *irreparably* injured by its being so negotiated.

Lord Chancellor said—that he could not reconcile the issuing the injunction where no subpoena was served. That in the case of waste, the injunction issued, *because the subpoena was filed*;—
but

but his Lordship declined making any order.—But upon its being mentioned a few days after, his Lordship ordered the injunction to go, and *the subpoena to be served at the same time with it (a).*

(a) As the defendant, in cases of special injunctions, having notice of the bill being filed, might appear *gratis* and put in his answer, the practice had become common not to serve him with a subpoena, ——— v. *Blackwood*, 3 Anstr. 851. It is now however settled, that it must be served in all cases, *Attorney-General v. Nichol*, 16 Ves. 338. though Lord

Eldon refused in that case, as the party had been misled by the practice, to dissolve the injunction, on the ground of the subpoena not having been served, but allowed the defendants to be heard on affidavits, considering the relators to have waived their right to an answer by not having served the subpoena.

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PATRICK
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1 Ves. jun. 435.
Lincoln's-Inn
Hall, 5th, 6th
March.

LYSTER v. DOLLAND.

WILLIAM LYSTER, since deceased, and *Thomas Lyster*, the plaintiff, being possessed of leases of three houses in *Charlotte Street, Bloomsbury*, for the remainder of a term of eighty-three years from the Duke of *Bedford*, (being building leases,) mortgaged the same to the defendant *Dolland*, by an assignment of 23d *December*, 1769, for the sum of £400, upon the security of each house, and gave three several bonds as a further security for the said mortgage money.

In *Michaelmas* Term 1780, defendant *Dolland* filed a bill in this Court, to foreclose the equity of redemption of the mortgaged premises, and the defendants thereto put in their answer, and prayed time to redeem the same; but the defendant *Dolland* did not proceed in the cause; but in the same *Michaelmas* Term commenced actions of debt on the bond against *William Lyster* and the plaintiff, and proceeded to judgment therein, and brought actions in ejectment to recover possession of the mortgaged premises, and obtained judgment in such actions.

In *May* 1781, *William Lyster* died, having made his will, dated 4th *June*, 1776, whereby he took notice that several building leases had been obtained in the joint names of himself and the plaintiff *Thomas Lyster*, but that the plaintiff *Thomas* had no beneficial interest therein: he gave all his leasehold estates to the plaintiff *Robinson*, in trust to sell, and after payment of the sums of money due thereon, and other his debts, he directed the surplus to be divided among the plaintiffs, *Sarah Lyster*, *Thomas Lyster*, and *Ann Tutischeff*, his three children, and appointed the plaintiff *Robinson* executor of his will; and by a codicil he appointed the plaintiff *Sarah Lyster* joint executrix with *Robinson*, who alone proved the will.

An equity of redemption of a term cannot be taken in execution under the statute of Frauds.

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The defendant *Dolland*, in 1781, advertised that the three leasehold houses would be sold by the sheriff of *Middlesex*, under the judgments obtained upon the bonds; and the premises were accordingly put up to sale, and sold for less than the mortgage money, to the defendant *Fairbone*, and had been conveyed to him; and it was admitted that he purchased the same as a trustee for the defendant *Dolland*.

The bill prayed that the defendant might account to the plaintiffs for the rents, &c. and that the plaintiffs might be at liberty to redeem.

The defendant *Dolland* swore by his answer, that the sale was with the privity and consent of the plaintiff *Thomas Lyster*, (who was since dead) to whom the equitable title in the premises survived on the death of *William Lyster*, and therefore insisted that the plaintiffs are not entitled to redeem.

It was argued on the 5th *March*, when Mr. *Mitford*, on behalf of the plaintiffs, contended—that they have now a right to redeem. That the execution being illegal, and an absolute nullity, the defendant's title is the same as if it had been never taken out, and *Dolland* has the legal title by ejectment, subject to the same equity of redemption that it was before. It is admitted that the profits of the sale are £300 less than the sum for which the executions were taken out, so that he is really in possession as a mortgagee.

Mr. *Lloyd* and Mr. *Scafe* for the defendants.—The Court will permit a mortgagee to take every remedy he can against the mortgaged premises, and the plaintiffs are not now entitled to redeem. The Court will not determine that this is not a saleable interest, or that it is such an interest as cannot be taken in execution. It has been held that equitable interests may be taken in execution. Under the circumstances of this case, there is no reason to permit a redemption. It is not like the case where the estate of the mortgagee has never become absolute. In *Endsworth v. Griffiths*, 2 Eq. Cas. Abr. 595. also 15 Vin. 468. pl. 8. (and in 1 Bro. P. C. 149.) under similar circumstances redemption was refused. *Dolland* having got possession of the estate by the sheriff's sale, was the same thing as if *Lyster* had conveyed to him. Here the property was mortgaged by the two *Lysters*, the survivor permitted and acquiesced in the sale.

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Mr. *Mitford* in reply said—where an estate is purchased by partners in trade, as in this case, for the purposes of a trade, though it is a joint interest, the equitable interest will survive to the representatives of one of the parties first dying, and that the executors of *William Lyster* had not joined in any of the acts, though *Thomas Lyster* had done so.

Lord

Lord Chancellor said—the prayer of the bill was sufficient to force his opinion, whether the holder of such an interest is entitled to take this sort of property in execution. Where the equitable interest is taken in execution, and sold for a gross sum of money, it is impossible to distinguish what is given for the equity of redemption, and what for the term. Where two persons take a farm, it is a joint adventure, so where two are concerned together in a trade; there the interest in the equity will turn round the joint estate; but the Court has been of opinion, that the interest of the joint representatives was subject to the adventure. If parties in trade purchase lands for the purposes of their trade, those purposes will affect the interest of the parties in the lands (a).

In the present case, if the defendant had contracted with the plaintiff to give him the advantage of the sale, that contract would have bound him; but it strikes me as impossible for the mortgagee to take the equity of redemption in execution, and sell it, throwing in his own title. This is a case of the first impression. Supposing an equity of redemption to be extendible, I do not know what effect it might have if the equity alone was sold; but it seems more difficult to admit it where the mortgagee throws in his own estate, so that it is impossible to distinguish how far the debt is extinguished by the sale.

It stood over, and came on again on the 6th *March*, (when the reporter was absent) when (as he has been informed) *Lord Chancellor* decreed in favour of the plaintiffs, that they be let in to redeem, on the ground that an equity of redemption was not liable to be taken in execution, under the stat. 29 *Car. 2. c. 3.* and his Lordship desired that might be taken notice of as the ground of the judgment (b).

(a) As to this, vide the Editor's note to *Thornton v. Dixon*, ante, 20.

(b) This opinion has been since confirmed by the judgment of the Court of King's Bench, in *Scott v. Scholey*, 8 *East*, 467; where it was determined, after a very elaborate discussion, that

a mere equitable interest in a term of years, cannot be taken in execution by the sheriff under a writ of *fi. fa.* at the suit of a judgment creditor, and that decision was followed by the Court of Common Pleas, in the case of *Metcalf v. Scholey*, 2 *N. R.* 451.

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S. C.

1 Ves. jun. 449.

Lincoln's-Inn
Hall, 12th March.

In a bill to perpetuate testimony of a right of common and way, the plaintiffs claimed in right of their estates, or otherwise—this is too loose: a demurrer, therefore, allowed.

CRESSETT and Others v. MYTTON.

THE bill stated, that the plaintiff, *Elizabeth Cressett*, was lady of the manor of *Holdgate*, com. *Salop*, as lessee for lives under the Bishop of *Worcester*; that the plaintiff, the then Bishop, *in right of his see*, was entitled to the reversion of the said manor, and that some of the other plaintiffs were seised of the inheritance in fee of certain messuages, &c. and others of them occupiers of other messuages, lands, &c. in the township of *Holdgate*, &c. and that the tenants, owners, and occupiers of the said messuages, lands, tenements, and hereditaments, in right thereof OR OTHERWISE, have from time, &c. and of right ought to have, and still of right have and ought to have common of pasture in and upon a certain waste, or common, called *Brownblee*, for their horses, sheep, and other cattle, and also a way or road for themselves, &c. over certain inclosed lands, in the parish of *Diddlebury*, in the county of *Salop*, belonging to the defendant *Thomas Mytton*, known by the name of *Earnestly Park*, (tracing the road) and which said road or way is separated from the adjoining grounds.

The bill further stated, that the defendant was seised of the inheritance of the lands, &c. and of the soil of the road, and that three years ago, the defendant sent to forbid the plaintiffs' tenants from turning their cattle on the common, or using the way, pretending a sole right of way and common, but had never commenced any action or proceeding to try the right, or obstructed them in the exercise thereof.

And the bill charged, that although the defendant now permitted plaintiffs to exercise their rights, by which means they were unable to bring them to trial at law, yet he declared, that after the death of their witnesses, he would dispute their right, and therefore prayed to have their witnesses examined, and their testimony perpetuated, &c.

To this bill defendant demurred; and for cause of demurrer, shewed, that the plaintiffs had not stated any legal right, in any persons, to have common or way in the premises, and that there are joined in the bill, several persons as plaintiffs, who appear, by their own shewing, to have distinct rights to their estates, and to their supposed right of common and way, and that it does not appear, in respect of what messuages, lands, or tenements, in particular, the right of common and way is claimed.

Mr. *Lloyd*, for the plaintiff, contended—that the bill was properly brought; that the distinction is, that the Court will not permit parties to bring a bill, where they have an opportunity of trying

trying their rights at law; but wherever the parties are so circumstanced that they cannot try their rights, the Court will direct a commission to try them: that the present case was the stronger, because the defendant, though he threatened a future contest of the right, permitted the present exercise of it: that a party in possession of such a right may maintain a bill, *Duke of Dorset v. Girdler*, Pre. in Chan. 531 (a), because he cannot bring an action. It is shewn as a cause of demurrer, that the plaintiffs have not stated their legal right. But the Court never expects, in cases like these, that the right should be stated with the same precision as it is necessary to do in a declaration at law. It is asserted here that the plaintiffs have a right, and it is not necessary to state it further. It is not necessary to state the right particularly. *Mayor of York v. Pilkington*, 1 Atk. 282.

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Lord Chancellor.—You have not stated whether the right of way and common is appurtenant or appendant to the land, &c. that you hold, and you state it loosely, that you have such right as belonging to your estate, or otherwise, so that your bill is to have a commission to try any right of common and way whatsoever (b). The difference between special pleadings and pleadings in this Court is, that a great deal of *verbiage* is allowed here; but still there must be some substance. If you want to perpetuate evidence, you must shew by what right you claim.

Demurrer allowed.

(a) By the report in *Vesey*, it appears that the *Lord Chancellor*, in the course of the argument, referred to the case of *Welby v. The Duke of Rutland*, 2 Bro. P. C. Ed. Toml. 39. the reporter has noticed it incorrectly in a note which is here omitted. It was not applicable to the present case, being a bill brought to establish a legal title, and for a perpetual injunction. As to the doctrine upon the subject of bills of peace, vide the Editor's note to *Wake v. Conyers*, 1 Eden, 335. and *Weller v. Smeaton*, ante, vol. i. 572.

(b) So in *Gell v. Hayward*, 3 Vern. 312. upon a similar bill to perpetuate testimony of a right of way, it was laid down that the plaintiff ought to set out the way exactly in the bill, *per et trans*, as in a declaration at law. That any interest, however slight, is sufficient to sustain a bill of this sort, vide *Lord Dursley v. Fitzhardinge*, 6 Ves. 251. *Smith v. The Attorney-General*, cit. ib. Mitf. Tr. 41. Coop. Tr. 52.



HALL, Widow, and Others v. NOYES, and Others.

BILL by the executors of *Hall*, who had become a bankrupt, and was since dead, against the defendants, praying accounts of profits received from leasehold property assigned to them by the bankrupt, and a redemption of the same, upon payment of money really advanced, with interest.

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Lincoln's-Inn
Hall, 13th March.

Where the account is incidental to plaintiff's title, the defendant must set it forth.

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NOYES.

The bill stated that the trustees appointed by an act of parliament for dividing commons, &c. in the parish of *St. Mary, Newington*, in *Surry*, demised premises situate at *Walworth Common*, to *Hall* the bankrupt, for ninety-nine years, at the rent of £66 *per annum*, and that *John Neale* had also let to *Hall*, a close at *Hazard's Bridge* for sixty-five years, at a rent of £30 *per annum*; that afterwards *Hall* becoming a bankrupt, and having obtained his certificate, re-purchased the premises from his own assignees for £245, that the close at *Hazard's Bridge*, being very valuable, on account of its containing a large quantity of brick earth, and having it in contemplation to make bricks there, and wanting money for that purpose, *Hall* applied to the defendant *Noyes*, to assist him with a loan, which *Noyes* agreed to do, but as a security required *Hall* to make an assignment of one moiety of the close to him, which was accordingly done, upon a nominal consideration of £262. 10s. but which was not paid, *Noyes* only giving *Hall* three promissory notes for £30, £20, and £20, the acceptance of a draft by *Hall* for £100, and a sum of £40 in cash: that *Hall* having granted building leases of some of the premises, and having occasion for money, applied to *Cross*, afterwards a bankrupt, (of whom some of the defendants are assignees) and requested him and the defendant *Noyes*, to advance him £1,000 on the mortgage of the lease of the ground at *Walworth*, and of the other moiety of the close at *Hazard's Bridge*; but the said sum of £1,000 was not all paid to *Hall*, but some part of it only, to the amount of £245: and *Hall* having contracted with one *Pye*, for the purchase of a leasehold estate at *Kent Bar*, for the remainder of a term of twenty-one years, for £335, and *Noyes* and *Cross* having given some security to *Pye*, for such £335, said £335 also made part of such consideration money, and *Pye* and *Hall* assigned the said leasehold estate, subject to the reserved rent thereon, to *Cross* and defendant *Noyes*, subject to redemption on payment of the said sum of £1,000 and interest, and *Noyes* v. *Cross* took from *Hall*, his bond and warrant of attorney, as a further security, upon which warrant of attorney judgment was afterwards entered up. The defendant *Noyes* afterwards having lent or pretended to have lent *Hall* promissory notes to the amount of £271; as a security for the same, took his bond in the penalty of £600 for securing payment of £300, and a warrant of attorney for the same, upon which he afterwards entered up judgment, and caused writs of *fi. fa.* to be issued, and by means thereof, levied and had satisfaction for all or nearly all the money due.

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The bill further stated, that a commission of bankruptcy was soon afterwards issued against *Cross*, and the defendants *Carr* and *Evans* were chosen assignees.

The bill further stated, that the defendant *Noyes*, in August 1776, got into possession of the close at *Hazard's Bridge*, or of one moiety of it, and made considerable profits by cutting and making hay

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pay thereon, and taking in cattle to feed, and on behalf of himself and Cross, or his assignees, got into possession of, and into the receipt of the rents of the mortgaged premises, and by that means was satisfied the interest and part of the principal of the said £1,000. That *Hall* being involved in debt, *Noyes* and the other defendants took advantage thereof, and got him to sign an account that £1,400 was due from him on the mortgage, and also that he was indebted to *Noyes* on other transactions £80, and got him to execute a second mortgage, to secure £1,451, and £80 and interest, with a power to sell, and to take the sum for which the premises should be sold, as a security for the said sum and interest, with a trust to pay the surplus, if any, to *Hall*. The bill then stated, that *Hall* and *Noyes* made a considerable quantity of bricks, on the close at *Hazard's Bridge*, and that *Noyes* having taken an absolute assignment of one moiety of the said close, but being conscious that it was intended only as a security for the money really advanced, but pretending, that by virtue of the assignment, he was entitled to one moiety of the said close, he, as an inducement to *Hall* to execute the indenture of 6th July, 1780, gave him to understand, that if he would do so, and would allow him, defendant *Noyes*, £210, as the money advanced by him on the said assignment, and £266, which he pretended to have laid out in making bricks, (though he had not laid out so much) and would let the said moiety be a security for the same, as well as for said sums of £1,451 and £80, he, the defendant *Noyes*, would permit *Hall* to redeem and become the owner of said moiety, and by such means *Hall* was induced to execute the said deed; and a deed poll was accordingly prepared, under the direction of defendant *Noyes*, and duly executed by *Hall* and *Noyes*, reciting those terms, and it was thereby witnessed, that in case *Hall* should pay the said sums, and all *Noyes's* future disbursements on account of the moiety, on or before the 6th October then next, *Noyes* should re-assign the premises to *Hall*. The bill further stated, that the defendant had sold the premises at *Kent Bar*, to one *Rolls*, and had sold a moiety of the close at *Hazard's Bridge* (being, as is alledged, the moiety which was comprised in the deed of 6th July, 1780,) by auction to one *Robinson*, but in fact, in trust for *Noyes*, (to whom it had been afterwards assigned) for £105, who had procured the lease to be delivered up to him, that in December 1781, he surrendered the lease to the landlord of the premises, and obtained from him a new lease, dated 22d December, 1781, for twenty-one years from Christmas then next, at the rent of £15 a year, whereby the landlord gave defendant *Noyes* license to break up the soil and make bricks thereon, upon payment of a fine of £925, in addition to said rent of £15 yearly.

The bill further stated, that defendant *Noyes* made large quantities of bricks, by means whereof, after payment of the rent and fine, large profits were made. It then stated, that *Hall*, being taken

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taken in execution for debt, assigned his equity of redemption (for a nominal consideration of £500, but of which he received only £40,) to the defendant *Schoole*, who assigned one moiety thereof to the defendant *Rybot*, and the death of *Hall* without being able to redeem, and that by his will, he made the plaintiffs executors, that *Noyes* and the other defendants were still in the possession of the premises at *Hazard's Bridge* and *Walworth*, and by the profits thereof had been fully paid the sums really advanced to *Hall*, and had a considerable surplus in their hands; and therefore the plaintiffs insisted they had a right to redeem, and prayed an account of the rents and other profits of the mortgaged premises, and that the same should be applied in sinking the principal and interest of the debt, and that, upon payment of the residue, the defendants might re-assign the premises to the plaintiffs.

The defendants put in very long answers to this bill, stating the transactions very much at large, but of which the import was, to insist that the real transaction was a sale from *Hall* to them, and after such sale, the defendant *Noyes* acknowledged that he made bricks on the premises at *Hazard's Bridge*, but insisted that he was not bound to discover *what quantity of bricks were made*, or to set forth whether other profits had been made from the said close, or any particulars relative thereto, as it appeared by plaintiff's own shewing that *Hall* had assigned all his interest in the premises to *Schoole*, and that the same is now vested in defendants *Schoole* or *Rybot*; and, for the same reasons, the defendants insist plaintiffs are not entitled to any account of the rents, profits, or produce of the premises; and in a further part of their answer the defendants said, "they hoped they should be allowed such benefit of the several mortgages and circumstances before set forth in bar of such discovery and relief, as if the same had been set forth by way of plea or demurrer to the said bill."

To this answer several exceptions were taken, some of which had been allowed by the Master, but others disallowed by him. The disallowed exceptions went to the answer not having discovered the profits made of the close at *Hazard's Bridge*, either by cutting hay thereon, or otherwise, or how the debts for which the mortgages were made were incurred, and particularly as to the number and quality of the bricks made on the premises at *Hazard's Bridge*, or the sums of money received for the same.

It came on now, upon exceptions to the Master's report.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Abbot* for the defendants, argued—that although they had submitted to answer in a case where they might have pleaded or demurred, yet the general rule, that where a party submits to answer, he must answer fully, did not apply in the present case; that submission will not entitle the plaintiff to a long account, in a case where a defence is set up that meets his title. Here the defence, on the part of the defendant *Noyes*,

Noyes, is, that he is a purchaser, not a mortgagee, and that defence is not merely set up by *Noyes*, but it appears upon the face of the bill, and is affirmed by *Hall* himself in his life-time. If the plaintiffs can make a case to shew they have a right to redemption, then they will be entitled to have an examination as to every particular now excepted to; but till they shew that, they are not entitled. It is not charged in the bill, that the assignment to *Schoole* was fraudulent. *Schoole* may now obtain the absolute interest in the estate; and whilst his title is out against the plaintiffs, they can have no relief. Wherever an answer denies the matter of the suit, the Court will not compel the defendant to answer what is consequential to the decree; it will not enforce an account whilst the title is doubtful: *Sweet v. Young*, Amb. 353. shews that where the plaintiff's title is doubtful, the defendant is not compellable to set forth an account. So in *Gethin v. Gale*, there cited, which was a bill for the possession of real estate, upon the ground that the defendant was illegitimate, Lord *Hardwicke* was of opinion, till this was established, the plaintiff had no right to an account. So, in a case in the Exchequer, where a defendant, though he had not pleaded that he was a purchaser for valuable consideration, but had insisted upon it (as is done here) by answer, the late Mr. Baron *Perrot* said he should not be obliged to produce his title deeds. Whilst the plaintiff's right is in contest, the account is immaterial; and whilst immaterial, the Court will not compel it. Gilb. Forum Romanum, 106. The case in 2 Ves. 445. (*Buden v. Dore*), is to the same purpose, though in that case the defendant might have pleaded. To the same effect was *v. Taylor*, before Lord *Bathurst*. In *Jacobs v. Goodman**, in the Exchequer, November 16th, 1791, the defendant said

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* *Jacobs v. Goodman*.—This was an injunction bill filed by the plaintiff, in order to injoin defendant from proceeding in an action at law, commenced against him for the recovery of £100 borrowed by the plaintiff of defendant: and the bill stated a partnership to have existed between plaintiff and defendant, and an account unsettled between them in respect of the partnership, and it alleged that on taking the account, it would be found that nothing was, in fact, due upon balance of all accounts to the defendant, and the bill called for an account of the partnership transactions. Defendant, by his answer, stated the agreement respecting the business to be, that plaintiff came to him and represented that he was well versed in the trade of glass and beads, and that if defendant would engage in it, he (the plaintiff) could be of great assistance to him; that it being convenient to defendant to advance the necessary sum, he did accordingly engage in the business, agreeing, that if at the end of six months it appeared that plaintiff had managed the trade to advantage, he should be allowed one third of the profits. And defendant denied that plaintiff had any other concern in the business, or that he was liable for any of the transactions thereof, save as it might happen for misconduct as a servant. And further denied that there was any other agreement between them other than as aforesaid, or that they had any connection in business other than as aforesaid. He further stated in his answer that this £100 was borrowed of defendant by the plaintiff, in order, as he said, that he might assist a sister who was in business. That plaintiff left defendant at the end of nine weeks, and then wrote to him an apology for thus leaving him, but adding, that he would send him the £100 in a few days.

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said in his answer that plaintiff was a servant, not a partner, and therefore resisted the account. The Lord Chief Baron held the plaintiff not entitled to an account until he proved a partnership; because otherwise any person, by alledging a partnership, might entitle himself to an account. If parties cannot plead in bar to the account, but must answer, this inconvenience will follow, that any person may have an account. The principle on which the plea in *Newman v. Wallis*, (ante, vol. ii. p. 143.) was over-ruled, does not extend to all cases; it applies, where the plea goes to the whole case, but not where the title and the account are separate, and the account is consequential to the title: though the Court will compel an answer as to the title, it will not compel an account *till the title is established*. Here it is a preliminary point, that the party has put the title out of himself.

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Lord Chancellor, in the course of the argument, and at the close of it, said—that supposing the case supplied matter for a demurrer, he could not take notice of the cause of demurrer on exceptions. It might have been cause of demurrer, that *Hall* having assigned his equity of redemption to *Schoole*, till he had displaced that estate, had not a right to a discovery: in such a case, the defendant might have met the plaintiff's title by a plea; and though he had held upon a former occasion, that a negative plea * was bad, he believed he was wrong in holding so; for that wherever a plea will reduce the question to one point, it is admissible. All the cases cited, were cases *where the title was completely separate from the account*: in that before the Lord Chief Baron it was completely so; and he could not say that where it was so, the

Exception was taken to this answer, because defendant had set forth no account, and because defendant had not set out what balance was due to him, and how he had made out the same.

Mr. Johnson, in support of the exception, stated, that defendant could protect himself from setting out an account only by a plea or demurrer, and that having answered, it was not sufficient to deny a principal fact, which would be a defence, but he must go on to answer all the collateral matter.

But the Court were of opinion that the answer was sufficient in this case.

Lord Chief Baron. You are not entitled to an account, unless there be a partnership, and your petition goes much too wide. At that rate, if an utter stranger was to file a bill against *Child's* shop, alledging a partnership, it could not be sufficient to deny that any such partnership existed. There may be cases where the Court will require an account, although the principal point in the bill is denied. But not in a case like this. Suppose to a bill for tithes, the defendant answered he was no occupier, or in many other cases of that kind, would not such an answer be sufficient?

Exception over-ruled.

* Vide *Newman v. Wallis*, ante, vol. ii. 143.

party

party was bound to give the account, but in the present he thought they were, and therefore allowed the exceptions (a).

(a) The cases establishing the modern doctrine that a defendant having submitted to answer, shall not, by his answer, protect himself from making a complete discovery, are collected in

the Editor's note to *Cookson v. Ellison*, ante, vol. ii. 252. As to the effect of a negative plea, vide the Editor's note to *Newman v. Wallis*, cit. sup.

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Tew v. The Earl of WINTERTON.
FORSTER v. The Earl of WINTERTON.
FORSTER v. FORSTER.

S. C.
1 Ves. jun. 451.
Lincoln's-Inn
Hall, 14th, 16th
March.

THESE causes comprised several questions as to the affairs of the family of *Forster*.

John William Bacon Forster, Esq. and the Rev. *Henry Wastell*, clerk, having several money transactions together, and in particular having entered into bonds for each other, and the said *John William Bacon Forster* being then at the point of death, *Henry Wastell* applied to him to execute, and he did execute a bond, bearing date the 14th of April, 1767, in the penal sum of £7,700, for securing the payment of £3,850, with legal interest for the same, and also a warrant of attorney to confess judgment on the same, and which judgment was afterwards entered up.

Interest on an old bond cannot be completed beyond the penalty. The Court will not give interest on the arrears of an annuity secured by bond in bar of dower.

On the 21st day of the same month, the said *John William Bacon Forster* made his will, and thereby devised his real estates to trustees, for payment of his debts and other uses.

And on the 27th of the same month the testator died.

By deed poll dated 11th of November, 1767, the said bond and judgment, and the principal and interest secured thereby, were assigned by the said *Henry Wastell* to *Edmund Tew*, for securing the principal sum of £1,000, and the same were afterwards made a security for the further sums of £600 and £400, and interest, and the same were afterwards assigned by *Wastell* to *Snow Clayton*, (subject to the prior assignments) as a security for £2,250.

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In *Michaelmas* Term 1768, the plaintiffs in the first cause, filed their bill on behalf of themselves and other creditors of the testator, to have their debts raised and paid. In *Hilary* 1769, the plaintiffs in the second cause filed their cross bill to have all the demands on the estates liquidated and paid.

By a decree in the two first causes, 11th of July, 1774, the proper accounts were ordered to be taken, and proper enquiries to be made respecting the specialty debts of the testator.

By the Master's general report, dated 13th of February, 1792, he certified (among other things) that he had set forth in the third schedule to his report, a particular account of the specialty debts of

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of the testator *John William Bacon Forster*, with interest on such of these as carried interest, after the rate they respectively carried, computed to the 20th day of *April*, 1792, except on such debts where the interest exceeds the penalty, and in that case had only computed interest to the amount of the penalty, and to whom the same are respectively due.

Exceptions were taken to this report by some of the bond creditors, because the Master had not computed interest beyond the penalties of their respective bonds, and particularly by *Tew* and *Clayton*, in respect to their assignment of the bond to *Wastell*, concerning which the Master had reported, that there was due to *Tew*, for principal money £1,000, and for interest from the 4th of *February*, 1770, (to which time all interest had been paid) to the 4th of *February*, 1790, being twenty years, at 5 per cent. £1,000, making together £2,000, the penalty of the bond, and that there was also due to *Tew* the further sum of £600, which *Tew* had lent to *Wastell*, who by indenture, dated 4th *August*, 1768, had charged the same on the bond and judgment, and for interest (as above) £600; that there was also due a further sum of £400 principal, and £400 for interest, under similar circumstances, making in the whole £4,000, and that there had been paid to *Tew* by *Alder*, the late receiver of the estates, on the 8th of *September*, 1789, the sum of £500, which reduced the principal and interest due to *Tew* to £3,500. And the Master reported that there was due to *Nathaniel Clayton*, the executor of *Snow Clayton*, on the assignment from *Wastell* to him, the principal sum of £2,250, and for interest from 27th of *January*, 1770, to 27th of *January*, 1790, the sum of £2,250, amounting together to £4,500, the penalty of the said bond.

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Mr. *Solicitor-General* and Mr. *Steele*, in support of the exceptions.—The exceptions are on the ground that the Master has been wrong in calculating interest only to the amount of the penalty in the bond; whereas he was bound by the reference to report the interest due. The direction in the reference imports that he is to report upon the condition in the bond; it does not give him authority to stop at the penalty, contrary to the expression in the reference. It is also against reason to stop short of the interest really due, as the whole might be recovered at law. This is established now at law, by the case of *Lord Lonsdale v. Church*, 2 T. R. 388. where Mr. Justice *Buller* said, he was not satisfied with the case of *White v. Sealy*, Dougl. 49. though that was distinguishable, as being the case of a surety. In *Elliot v. Davis*, Bunb. 23. in *Holdipp v. Otway*, 2 Saund. 106. and *Duwall v. Terrey*, Show. Parl. Cas. 15. the penalty is considered merely as a security. We must admit that interest is given at law, as damages: and perhaps it may be argued, that it is not referred to the Master to calculate damages; but if the penalty is not the real debt, but only the security, and the debt is the principal and interest,

terest, then it is within the terms of the reference of what is due. In fact it would be unreasonable not to do this for a bond creditor; because, after a decree for administration of assets, if the creditor brings an action, he is stopped by the decree, and the decree operates as an injunction from taking his legal remedy: then the Court will not prevent his taking his legal remedy without giving him something as beneficial, which it will not do unless it calculates the interest beyond the penalty. The penalty is only meant to operate where the debt and interest are less. Under the circumstances of *Clayton's* case particularly the whole interest should be allowed. He could only take subject to *Tew's* claims, and £500, had been paid to *Tew* without any application. He was a judgment creditor, and therefore should have his whole interest. Hard. 136. 3 Atk. 517. *Godfrey v. Watson*. If the debtor comes into equity for relief, he must pay interest, though beyond the penalty.

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Mr. Lloyd, in support of the Master's report.—The practice was settled in the case of Sir Stephen Evance's creditors, 1 Atk. 80. (*Bromley v. Goodere*), that upon bonds no interest can be given beyond the penalties. In *Ketilby v. Ketilby* (a), 1st December, 1774, there was a decree for payment of creditors. Some of the bonds were seventy years old. The creditors insisted, that the fund being ample, they ought to be paid their full interest. On the other side, the practice was insisted upon; and Master Montague (to whom it was referred) consulted all the Masters. His report was excepted to, and the exception was argued before Lord Bathurst and the Master of the Rolls, who were both clearly of opinion that the practice ought not to be broke in upon. In the late case of \**Knight v. Maclean*, your Lordship inclined to the same opinion, though you did not decide it.

Lord Chancellor.—I thought I had decided that case. I do not know what they may do at law, when the rule which has been alluded to, comes to be pushed to all its consequences. How far back will they take it? How can it be taken against an heir, or in the case of an administrator, where they declare only in the debt? If you insist that the bond is not a security for the penalty, but for some other debt, the Master is not competent to vary the contract.

I cannot possibly alter the course of the Court. If the Master had taken the circumstances under consideration, he would have been mistaken.

*Exceptions over-ruled.*

\* See the next case, the decree not having been made till after the decision of this case, though it was argued before it, and very much at large.

(a) See this case, particularly referred to by Thompson, B. 2 Anstr. 527. It is reported 2 Dick. 514.

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Another question arose in the third of these causes, under the following circumstances:

*William Bacon Forster*, in contemplation of a marriage with *Frances Pewterer*, who was afterwards his widow, and now the wife of the defendant *Bentham*, entered into a bond, bearing date 20th of *February*, 1780, in the penal sum of £10,000, conditioned that he should, as soon as conveniently might be, convey sufficient freehold or copyhold estates, in trust to raise and pay to said *Frances Pewterer*, in case she should survive him, during her life, a clear annuity of £600, in full satisfaction and bar of dower, &c. And by a memorandum subscribed to the said bond, and signed by the said *Frances Pewterer*, she declared that she did freely accept of the said jointure, in full bar and satisfaction of and for all dower and thirds, to which she might be entitled on account of the said marriage. On the 23d of *February*, the marriage took effect, and on the 15th of *April* following, *William Bacon Forster* died, leaving his widow ensient with the plaintiff in the third cause.

By a decree in this last cause, the 3d of *February*, 1790, it was ordered, that the former decree should be carried into execution, and (amongst other things) it was ordered that this bond and memorandum should be established, and that the defendant, the widow, having agreed to accept the annuity of £600 out of the real and personal estate of her said late husband, in bar of dower, it was declared that she was to be considered as a specialty creditor of her said late husband, and was entitled to be paid the arrears of her said annuity from his death, out of the personal estate of her late husband, in a course of administration; and if the same should not be sufficient, then out of the real estates of which he died seised in fee; and if those were not sufficient, then out of such estates of which he was tenant in tail, provided such deficiency did not exceed the amount of the dower to which she would have been entitled in case she had not, by the said memorandum, accepted the said annuity. And the Master was to take an account of such arrears, and was also to enquire and state of what estates the said *William Bacon Forster* died seised as tenant in tail, out of which the defendant *Frances* would have been dowerable; and of the incumbrances on such estates.

By the Master's separate report, the 23d of *June*, 1789, he had certified that the only assets of *William Bacon Forster*, to satisfy the said annuity, consisted of several sums of money received by the said defendant as his administratrix, and which then could not be ascertained; and he now, by his general report, and the schedule thereto, stated of what estates the said *William Bacon Forster* stood seised as tenant in tail; and that the same were subject to outstanding terms, to secure an annuity to *Sarah*, the widow of *John William Bacon Forster*, and other incumbrances; and submitted the question as to the defendant *Frances's* title to dower

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dower thereout. He further certified, that by orders of this Court, dated 27th of *June*, 1789, and 23d of *June*, 1790, the defendant *Frances* had been paid two sums of £300 each; and that the whole of the annuity, from the 15th of *April*, 1780, to the 15th of *April*, 1792, then remained due to her, and amounted to £7,200, (except the said two sums of £300 each) and that the rents and profits of the estates out of which she would have been dowerable, amounted to £23,289. 14s. 9½d. subject to deductions; which reduced the same to £11,018. 10s. 5d. And the Master also found that the said bond was the only specialty debt of the said *William Bacon Forster*.

The question now before the Court was, whether the defendant *Mrs. Bentham*, having received only the said two sums of £300, and having so great an arrear of her annuity due to her, *should be paid interest on that arrear*; and it was stated that she had been obliged to borrow money for her subsistence, during the time such arrear was run, for which money so borrowed she had paid interest; and that the funds, out of which she was entitled to the arrears, had been actually carrying interest during the whole time.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Ainge*, for the defendants *Bentham* and his wife.—The question is, whether *Mrs. Bentham* is entitled to interest on the arrears of the annuity. In *Ferrers v. Ferrers*, For. p. 2, it is said, that a jointress is not entitled to interest on the arrears of an annuity, because the arrears are uncertain: and it has been laid down, that interest is not given, unless the party is obliged to come here to get rid of a penalty; and that then the Court will compel the party to pay interest. But in the case reported, 2 Ves. 662, it is laid down, that where a jointress is obliged to borrow money, and pay interest for it, that is a ground for the Court to give her interest on the arrears of her jointure. In the case of the *Drapers Company v. Davis*, 2 Atk. 211, interest was given upon the arrears of an annuity, the sum being liquidated. That case does not differ materially from this; in the present case, the annuity is secured by a bond; and Lord *Hardwicke* there states the cases in which the Court will give interest, to be those of a wife and child, for whose subsistence the annuity is given. There cannot be a stronger case than the present, where no personal misconduct can be charged, the owner of the estate being an infant, and a sufficient fund being in Court from the rents of the settled estates, to a third part of the profits of which the defendant would have been entitled; and which fund has actually been producing interest all the time.

Mr. *Solicitor-General*, and Mr. *Mitford*, for the plaintiff.—No interest can be given. This is a mixed case; it is true, that the jointress is, by the decree, to be considered as a specialty creditor; but she is also to be considered as a dowress, and this Court has

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has never given interest on arrears of dower. In the case of the *Drapers Company v. Davis*, it was upon an ascertained annuity. In *Bennifold v. Waring*, which was before the Court during the sittings after last *Trinity Term*, an annuity was charged on the estate of Sir *George Wynn*, and your Lordship thought you could not give interest on the arrears. In a case of *Lindsay v. Gibbon*, in the year 1780, Lord *Loughborough* said, there were no cases that warranted giving interest on dower (a).

Lord Chancellor. said—if he was entitled to give interest, he must look into the cases for a ground on which to do so. The Court has never given interest, but where there has been some ground from whence it could gather that there was a contract between the parties that interest should be paid. The ground from compassion, is too loose and indistinct. The reasons for giving interest, cannot turn on the fact whether the party was or was not in distress. The annuity being intended as a maintenance, is not, in all cases, a ground for its carrying interest. To take up the consideration in that way, would be too much. Where trustees were bound to make regular payments, and have kept money in hand, the Court has given interest.

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His Lordship ordered the arrears of the annuity to be paid out of the personal estate, as far as it would go, and the deficiency to be made good out of the settled estates, out of which the defendant would have been entitled to dower, if she had not accepted the annuity.

(a) There are several cases in *Dickens* upon this subject, shewing that this had long been the practice in the Master's offices. *Grosvenor v. Cook*, 1 Dick. 505. *Kettleby v. Kettleby*, *Rundle v. Pettit*, 2 Dick. 514. *Gibson v. Egerton*, *Bumstead v. Stiles*, 1 Dick. 408. in the last of which, Lord Camden was so clear upon the point, that he wished he had been warranted in making the exceptants pay costs. It has ever since been the uniform practice, *Lloyd v. Hatchett*, 2 Anstr. 525. *Sharpe v. Earl of Scarborough*, 3 Ves. 557. *Mackworth v. Thomas*, 5 Ves. 329. *Clarke v. Seton*, 6 Ves. 411. *Ex parte Rushworth*, 10 Ves. 409. *Butcher v. Churchill*, 14 Ves. 574.

The cases at law, contradicting the opinion of Mr. Justice Buller, in *Lord Lonsdale v. Church*, 2 T. R. 388. are *Brangwine v. Parrot*, 8 Bl. Rep. 1190. *Wilde v. Clarkson*, 6 T. R. 303. *Shutt v. Proctor*, 2 Marsh. 226. *M'Clure v. Dunkin*, 1 East, 436. in which however, it was decided, when a foreign judgment had been recovered on a

bond, in an action upon the judgment, interest might be recovered in damages beyond the penalty, vide Serjeant *Williams's* note to *Gainsford v. Griffith*, 1 Saund. 58.

As to the application of this doctrine in bankruptcy in the event of a surplus, vide the Editor's note to *Ex parte Champion*, ante, 436. and as to the general doctrine upon the subject of interest, *Creuz v. Lowth*, post, vol. iv. 316; and the cases cited in the Editor's note; also *The Attorney-General v. Mainwaring*, 2 Pr. 80. where the present case was relied upon by *Richards, B.* in differing from the Court upon the question, whether the crown was entitled to interest on the whole sum liquidated by the deputy remembrancer's report, upon a reference to ascertain what was due for principal and interest on a forfeited bond, where the funds in Court, out of which it was ultimately to be paid, were the produce of the sale of real estates seised under an extent at the instance of the crown.

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KNIGHT v. MACLEAN.

16th March.

**R**ICHARD GLOVER, of Croydon, entered into a bond to Richard Glover, of Woldingham, bearing date 20th of November, 1749, in the penalty of £2,800, conditioned for the payment of £1,400 on the 20th of November then next, with lawful interest. The Master, in computing interest on a bond, is not to go beyond the penalty.

This bond-debt being unpaid, and a bill being filed for accounts of the estate, &c. of Richard Glover, of Croydon, by decree in the original suit, such accounts were directed to be taken.

The Master, by his general report, dated 15th of May, 1790, stated the bond, and that he had allowed the penalty thereof.

Exceptions were taken to the Master's report, the second of which went (*inter alia*) to the Master having allowed only the penalty of the bond.

These exceptions came on to be argued on the 24th of November, 1790, before Mr. Justice Buller, then sitting for the Lord Chancellor, when Mr. Mansfield, Mr. Lloyd, and Mr. Short, for the executors, contended—that the Master ought to have calculated the full interest down to the present time, and not to have restrained himself to the penalty. That there is no rule to this effect in the books, and that although the practice has been so, it arose from a conformity to the rule of the Courts of common law, but that even there the rule has become obsolete, and the jury now will, in the shape of damages, give the full interest. That, in the present case, the Master had calculated the full interest on notes of hand, so that interest was given on simple-contract debts, but stopped on a specialty. They cited *Lord Lonsdale v. Church*, 2 Term Rep. 588. Bunb. 23. *Duval v. Terrey*, Shower's Parl. Cases, 15. 1 Salk. 154.

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Mr. Solicitor-General and Mr. Shuter, on the other side, contended—that it was always the practice of the Master's office, to restrain the calculation of interest to the penalty of the bond. That it would be difficult to argue that if a court of law gave further interest, that a court of equity should not do the same: but that at law it was given in the shape of damages, and the Master could never calculate damages. That the only case where interest was extended beyond the penalty was, where the debtor was plaintiff, which was the case in *Shower*, but where the creditor was plaintiff it was never done. *Hale v. Thomas*, 1 Vern. 349. If the practice of the Court is to be changed, it should be by a decree, not in the Master's office.

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Mr. Justice *Buller*, immediately after the argument, said—the question is, whether the Master ought not to calculate the whole interest due, without stopping at the penalty.

The direction is, to calculate interest down to the time, and that direction the Master ought to follow, and calculate the interest to the time of the report.

There may be cases, that say the interest shall only be to the amount of the penalty; but they are very old cases, and were determined in conformity to the rule of law.

But it is now held otherwise, even there. I remember a case in the year 1765, in the King's Bench, where it was held otherwise, and Lord *Mansfield* cited a case at *Nisi Prius*, where Mr. Justice *Wright* directed the jury to find damages beyond the penalty. The case of *Wright v. Sealy*, Dougl. 48. was determined, on the ground of its being the case of a surety, who never could be held to have intended to bind himself beyond the extent of the penalty, but the exception proves the general rule to be otherwise. Then if it be so at law, where is the equity to prevent it being so here? Will a court of equity narrow the remedy of creditors, whom in general it favours more than a court of law does?

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The second exception was therefore allowed, so far as the same went to the Master's not allowing interest beyond the penalty of the bond.

The exceptants being dissatisfied with this order, preferred their petition to the *Lord Chancellor*, praying that the exceptions might be re-argued, which being ordered, they came on for that purpose, 18th of *March*, 1791.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Abbot*, supported the exceptions.—In every case except this, the sum in the condition of the bond, is considered as the real debt. There is no distinction between a bond for payment of money, or for securing the performance of a collateral act: now it is settled, that a man cannot pay the penalty of a bond in discharge of an obligation, to settle an estate to certain uses, though in that case it is an agreement to do a thing, the performance whereof is secured by the penalty. *Hobson v. Trevor*, 2 P. W. 191. *Earl of Lonsdale v. Church*, 2 Term Rep. 388. So it appears by *Godolphin*, 70. that, in the question as to *bona notabilia*, the sum in the condition, not the penalty, is considered as the debt. So in a deed with a penalty for performance of covenants, or for payment of money by instalments, the party may bring debt before the instalments become due, and is not confined to the penalty. The cases where the penalty has been considered as the utmost sum to be recovered, were so determined, in order to follow the practice of the courts of law. They are old cases, and the reason has ceased, as it is now established by precedent, that interest may be given, even at law, beyond the penalty. When this was on before, a case was cited in which Mr. Justice

*Wright*

*Wright* had directed a jury to find to the extent of the interest due, and that case was afterwards approved by the Court; a difficulty may arise on that practice there, for if a man owed *A.* £100, and *B.* £100 on bond, and *A.* recovered judgment for £100 debt, and £100 damages, though the judgment is entire, the £100 damages could not be set on the same footing with *B.*'s bond-debt. But in modern cases in equity, interest has been given beyond the penalty: it was so in the case reported, Shower's P. C. 15. and though there are some particular circumstances mentioned in the close of that case, as grounds for affirming the decree, yet it seems as if the reasons proceeded on the general ground. The general doctrine seems to have been first fixed in *Hale v. Thomas*, 1 Vern. 349. Lord *Coxper*, in 1707, considered the case as clear. In 1718, there is a case to the same effect reported by Bunbury, p. 23. So in 1 Eq. Abr. 288. referring to Salk. 154. There have been several subsequent cases to the same effect, *Godfrey v. Watson*, 3 Atk. 517. some of them in the House of Lords (as was that reported by Shower) also *Lord Dunsany v. Plunket*, 2 Brown's P. C. 251. *Kirwane v. Blake*, *ibid.* 333. *Corporation of Galway v. Russel*, *ibid.* 275. A court of equity looks upon the bond as an agreement, even where there is no debt, *Acton v. Pierce*, 2 Vern. 480. *Cannel v. Buckle*, 2 P. W. 342. where the Court could not confine itself to the penalty, because the bond was void at law. In *Bishop v. Church*, 2 Ves. 100—371, the penalty was gone at law, but relief given in equity. Now there is no principle upon which the Court can give relief upon an instrument void at law, without giving it to the full extent of the debt. There would be many cases of great hardship if the creditor was tied down to the penalty, as in the case where assets fall in at a great distance of time. In the present case, no diligence could have obtained payment, for there were no assets for many years. The principle is, that the Court will look to the real debt, not to the penalty by which that debt is secured.

Mr. *Mitford*, in support of the Master's report, said—that the case of *Lord Lonsdale v. Church*, would not be found to be a decision on the subject. The rule under which the Master has acted, is clearly established both at law and in equity; courts of equity have recognized the rule, and considered themselves as bound by it, except in cases where fraud has intervened, or the parties have submitted, as was the case of *Duval v. Terrey*. The case of *Elliot v. Davies*, is very shortly stated in Bunbury. In that of *Holdipp v. Otway*, 2 Saund. 106. the Court thought that upon a single bill obligatory, interest might be given in the shape of damages. In *Lord Dunsany v. Plunket*, the party was in possession, and the plaintiff came to be relieved against that possession, and the Court imposed the terms of paying the interest due. The case was the same in *Godfrey v. Watson*. *Kirwane v. Blake*, proceeded on the fraudulent conduct of the party.—On the general ground there is a

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very strong case, *Bromley v. Goodere*, 1 Atk. 75. against carrying interest further than the penalty.

*Lord Chancellor* (during the argument)—threw out great doubts as to the nature of the debt, and order of payment of the interest *ultra* the penalty (supposing the penalty not to be the debt;) whether it would be a debt by specialty, or by simple contract, and ordered the matter to stand over for judgment.

But before any judgment actually given in this cause, the preceding case of *Tew v. Lord Winterton* came on, in which the same point was agitated, and *Lord Chancellor*, having satisfied his judgment on the subject, ordered the exceptions in the present cause to be

Over-ruled (a).

(a) See the note to the last case.

S. C.  
2 Dick. 769.

*Ex parte* SALTER.

Rolls,  
16th March.  
Guardian may be appointed, and maintenance allowed, upon petition without suit.

The costs of the petition are to be allowed to the guardian in his accounts.

UPON the petition day before *Michaelmas* Term, this petition came on, praying for a guardian and maintenance, on behalf of an infant, and for a receiver, but without any suit in Court.

Mr. *Abbot*, for the petitioner—cited *Ex parte Kent*, June 15th, 1790, where the like order had been made (ante, 88.) upon authority of *Ex parte Whitfield*, 2 Atk. 315. and prayed that the Master might also tax the costs of this petition, on authority of *Ex parte Thomas*, Ambl. 146.

The *Chancellor* thought with Lord *Hardwicke*, in 2 Atk. 315. —that no receiver could be granted; but he also doubted the propriety of having the costs taxed, though so reported in *Ambler*. He ordered the guardian and maintenance.

Afterwards Mr. *Dickens*, the Register, drew up the order, but would not deliver it out, and stated to the *Chancellor*, that maintenance ought not to be ordered, without a suit to bring the fund into Court; and that though the practice had been so formerly, yet when Lord *Kenyon* was Master of the Rolls, it had been discontinued. It was directed to be mentioned again.

In the course of the term Mr. *Abbot* renewed his application, and cited the following precedents, which the *Chancellor* desired might be laid before him.

The first instance of a guardian appointed on petition, without bill, is said to have been in 1696, in the case of *Hampden*, Harg. Co.

Co. Litt. fo. 131. notis. But this order does not appear upon the Register's Book.

*Ex parte Dacre Barrett Lennard* (Reg. Lib. A. fo. 85. Anno 1723.) Maintenance ordered by Lord *Macclesfield*.

The order for maintenance (as well as upon the right of guardianship) affirmed by the House of Lords, 1724. 2 Bro. P. C. 539. *Lady Teynham v. Lennard*.

Lord *Hardwicke*, speaking of this case, says—"Here is a precedent in point, where maintenance has been allowed upon the authority of Lord *Macclesfield*, and the House of Lords, notwithstanding there was no cause depending." 2 Atk. 316.

*Ex parte Odel*, 1731.—Maintenance ordered by Sir *Joseph Jekyll*, cited in 2 Atk. 315. but does not appear upon the Register's Book. In this case it is said a receiver was also appointed.

*Ex parte Peploe* (Reg. Lib. B. fo. 436. Anno 1733.)—Maintenance ordered by Sir *Joseph Jekyll*. In this case also, a receiver was appointed.

*Ex parte Whitfield* (Reg. Lib. B. fo. 391. Anno 1741.)—Maintenance ordered by Lord *Hardwicke*.

The judgment of the Court, with the reason and authorities upon which this sort of order is founded, is reported at length, 2 Atk. 315.

*Ex parte Thomas* (Reg. Lib. B. fo. 350. Anno 1751.)—Maintenance ordered by Lord *Hardwicke*. This case is reported, Ambl. 146.

*Ex parte Kent*, (Reg. Lib. A. fo. 445. Anno 1789.)—Maintenance ordered. (ante, 88.) Also in the latter case the guardian was ordered to enter into a recognizance.

December 17th. At the last seal, this was again mentioned, when the Chancellor said, he thought the practice was too old and established to be now altered; also, that in many instances it was highly convenient; and he directed the order to be issued.

March 16th, 1792. This matter came on again before the Master of the Rolls, upon petition to confirm the report, and to have the costs taxed according to the form of the order in *Ex parte Thomas*.

Mr. *Abbot*, for the petitioner.

Ordered (a).

(a) Mr. *Dickens*, in his report of this case, which he gives very fully, has added the reasons which he addressed to Lord *Thurlow*, against this practice; and a case in the Duke of *Newcastle's* minority upon an application upon petition for maintenance, in which Lord

*Rosslyn* refused to allow it, unless the parties filed a bill. Lord *Redeale*, in *O'Keefe v. Casey*, 1 Sch. & Lef. 106. observed, that it was unnecessary to file a bill for the appointment, though it would be necessary to do so for the removal of a guardian.

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Lincoln's-Inn  
Hall, 23d Mar.

Surrender of a  
copyhold estate  
not an act of  
bankruptcy un-  
der 1 Jac. 1. c. 15.  
s. 2.

Where there is  
a bond of indem-  
nity, and the pe-  
titioners have  
paid part before  
bankruptcy, and  
part after, they  
may prove the  
whole.

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*Ex parte COCKSHOTT*, in the Matter of JOHN RIDEHALGUE,  
a Bankrupt.

**T**HE prayer of this petition was, that the petitioners might be admitted creditors, and to prove a debt of £327. 5s. 10d. under the commission, and for that purpose stated—

That by a bond dated 25th of *May*, 1785, petitioners, together with *Lawrence Ridehalgue*, became jointly and severally bound to *Gabriel Wilkinson*, in the penalty of £600, conditioned for payment of £300 and interest, on or before the 20th of *May*, 1786.

That by a bond of indemnity, executed by said *Lawrence*, and the bankrupt, dated 18th *June*, 1785, *Lawrence* and the bankrupt became jointly and severally bound to the petitioners, (among other things) to indemnify the petitioners from the payment of said £300 and interest, secured by the said bond.

That about the 30th of *January*, 1790, the petitioners paid to *Wilkinson*, £118. 2s. 6d. and about *April*, the petitioners paid him £209. 3s. 4d. making together £327. 5s. 10d. for the principal and interest then due to him on the bond.

That on the 23d of *February*, 1790, a commission issued against *John Ridehalgue*.

That on the 15th of *December*, 1790, the petitioners applied to the major part of the commissioners, to be admitted to prove their debt of £327. 5s. 10d.; but were refused, and a dividend of 6s. 8d. in the pound had been made.

*Mr. Cooke*, in support of the petition, said—the alledged reason for the commissioners refusal of the prayer of the petitioners debt, was, that he committed a previous act of bankruptcy, by surrender of a copyhold estate to one of his creditors, to give him an unfair preference, but that it had been held by Lord *Mansfield*, in *Martin v. Pewtress and Roberts*, 4 Burr. 2477. that an assignment, in order to be within the clause of the 1 Jac. 1. c. 15. s. 2. must be by deed—that was a case of goods bought by the bankrupt on credit, and given up to the creditor, for the purpose of an unfair preference, and not being a conveyance by deed was not an act of bankruptcy; that so the present case, being by a surrender, though a fraud, was not an act of bankruptcy.

He also contended, that the plaintiff had a right to prove both the sums paid. That the condition being broken, and the bond forfeited at law, the petitioners had a right to prove all they had paid under it.

*Mr. Mitford*, on the other side, said—it had been held that copyhold estates were within the bankrupt laws; and therefore a surrender of such estate would be within the clause as an act of bankruptcy

He



He also contended, that though it was true, under an annuity bond forfeited at law, you had a right to prove the whole, it was not so under a bond of indemnity.

Lord Chancellor thought—that in order to be within the words in the statute “make any fraudulent grant or conveyance of his, her, or their lands, &c. whereby his creditors shall be defeated or delayed for the recovery of their just debts,” the conveyance must be such as would defeat or delay the creditors in recovering at law, and therefore could not extend to this case, the copyhold being neither liable to a *fieri facias* or an *elegit*; therefore it is a conveyance of that which the creditors could not get hold of (a).

And that as, if there had been no bond of indemnity, the petitioners having paid the money on account of the bankrupt, might have brought an action, so there being a bond, they would recover upon it, and the condition of the bond being broke before the bankruptcy, they had a right to prove the whole of what they had paid (b).

He therefore granted the whole prayer of the petition.

(a) This very point had before been alluded to by Lord Mansfield, in *Hassels v. Simpson*, Doug. 93, n.

(b) A surety before the statute 49 Geo. 3. c. 121. might prove his debt under a commission against the principal, either when he had paid the debt before the bankruptcy, or where he had received a bond of indemnity, which had become forfeited before the bankruptcy, *Toussaint v. Martinnant*, 2 T. R. 100. *Martin v. Court*, ib. 610. *Hodgson v. Bell*, 7 T. R. 97. and now by that statute, both sureties and per-

sons “liable for” the debts of bankrupts (as to the construction of which latter words, vide *Ex parte Lobhon*, 17 Ves. 334. *Ex parte Yonge*, 3 Ves. & Bea. 40.) may prove, although they may have paid the same after the commission, in case the creditor has not proved, and in case he has proved, may stand in his place, provided the surety, at the time he became such, had not notice of any act of bankruptcy, or that he was insolvent, or had stopped payment.

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*Ex parte* HANKEY, in the Matter of MILLS and SWANSTON, Bankrupts.

Lincoln's-Inn  
Hall, 24th Mar.

THIS was a petition in the same bankruptcy with that, *Ex parte Champion*, reported ante, p. 436. it proved that the commissioners might be ordered to compute interest on the sum of £11,345. 5s. 1d. proved by the petitioners, against the estate of the bankrupts, and that the same might be paid to the petitioners. It stated that the petitioners are bankers, that the bankrupts employed them as such, that bankers in London frequently assist their employers by temporary loans of money, and that such loans carry an interest at the rate of £5 per cent. and that it has for a great number of years been a custom well known and established in the city of London, that bankers have a right to charge, and actually do

Interest allowed to be proved on the bankrupt's notes to bankers (not reserving interest) there being a surplus of the bankrupt's estate, after payment of 20s. in the pound.

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do charge their employers interest on such loans, whether any previous agreement is made for that purpose or not, and such loans are made on the faith of such custom, and with full knowledge thereof: and that it is the custom of merchants, and particularly of *West-India* merchants, to charge their correspondents interest for monies in advance, and for extraordinary credit on goods supplied.

That in and previous to 1772, the petitioners lent the bankrupts different sums of money and paid their drafts beyond the amount of their cash in hand, and charged interest, and were allowed and paid the same by the bankrupts.

That on the 9th of *December*, 1772, the petitioners lent the bankrupts £3,000, for which the bankrupts gave a promissory note in the following terms: "We promise to pay on demand to Messrs. *Hankeys* and Co. £3,000, for value received."

On the 1st of *January*, 1773, the petitioners lent the bankrupts the further sum of £3,000, on a similar note.

On the 18th of *March*, 1773, the petitioners lent the bankrupts £4,000, on a similar note.

On the 21st of *July*, 1775, the petitioners lent the bankrupts the further sum of £3,000 on a promissory note in these terms: "We promise to pay to Messrs. *Hankeys* and Co. £3,000 with interest for the same, at the rate of £5 per cent. per annum."

That the said sums, making together £13,000, were actually lent and advanced by the petitioners to the bankrupts, at interest, at the rate of £5 per cent. per annum, and that the petitioners having, previous to the month of *January*, 1776, received of the bankrupts several sums of money on account of the interest accrued on the said debt, made up an account of the same in their books, amounting to £567. 8s. which was charged in their accounts with the bankrupts, and allowed by them, and that the bankrupts kept a bank book, in which the sums accrued due for interest since were likewise entered.—It then stated the bankruptcy, and that the petitioners having charged the bankrupts with £45. 11d. for the balance of interest on the said sum of £13,000, to the time of the date of the commission, they had still in their hands two sums of money belonging to the bankrupts amounting to £1,654. 14s. 11d. and the petitioners being entitled to deduct the same out of £13,000, there remained due to the petitioners from the bankrupts £11,345. 5s. 1d.; and one of the petitioners proved the said debt against the bankrupt's estate.

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The petition then stated that there was a surplus, and the petition of *Morris* with the order, and an application to the commissioners, and their refusal to admit the same, as stated in the petition *Ex parte Champion*, and prayed as above.

The petition came on immediately after that, on the 4th of *February* last, but it was suggested that a copy of it ought to have been served on *W. Swanston* the surviving partner, as being interested

rested in the surplus. It therefore stood over for that purpose, and he having been served, it came on now.

It was admitted that the three notes, which did not express interest, were drawn by *W. Swanston*, who was cashier of the house, and that which expressed interest, by a young partner in the house, who had never been used to conduct that part of the business.

*Mr. Mansfield* and *Hollist* contended that the petitioners were entitled to interest on their debt. That it is the custom of bankers to charge interest on sums advanced in this way to their customers. That this was allowed in the case *Ex parte Champion* to another creditor. The only objection made is, that interest, in such cases, is given by a jury as damages. It is a debt that carries interest in its own nature, and therefore it was unnecessary that interest should be mentioned on the face of the note. The notes are payable on demand. Both the acts relative to protests, that of *King William* and that of *Queen Ann* direct interest to be paid. In this case an agreement for five per cent. interest is sworn to by the petitioner *Hankey*, so that the express contract was lending money at interest. In *Robinson v. Bland*, 2 Burr. 1077, interest was given, though not expressed in the note; and Lord *Mansfield* said it was due both at law and in equity. And lately the Common Pleas have given interest upon interest upon money advanced for the defendant's use.

*Mr. Solicitor-General* and *Mr. Mitford*, on the other side.

The question turns on the nature of the contract made with the *Hankeys*. They had four bills, and now contend that the effect of the bills which do not express interest is the same with that of the one that does. They state that interest is due by law, because there is a custom of bankers to charge persons with whom they deal in this way with interest, and that books were kept between them and the bankrupts, in which interest was entered and allowed. It is too late, since the case of *Sir Stephen Evance's* creditors, to contest the power of the Court to give interest on a bankrupt's debts where there is a surplus; though it is difficult to trace such power from the clauses in the acts of parliament: but the Court will not go beyond what was done in that case: There bond debts bore interest to the extent of the penalty; notes expressly reserving interest to the full extent of the interest due; but no debt was ordered to carry interest for which interest would have been given by a jury only as damages: not upon notes not reserving interest, though there had been a demand; because there at law the interest could only have been given as damages. In the case determined (*Ex parte Champion*) it was upon contract, and the petitioners might have claimed the interest under the commission. There the goods were sold on a contract that they should be paid for at a future day.

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Some doubt may be entertained on that case, because where goods are so sold, and an action is brought for the value, the interest is always given as damages. Though there be a custom of bankers to charge interest, if an action had been brought on the three bills, the interest would have been given as damages: and if any part of it had been paid, it would have been deducted as so much paid of the damages; and if they could recover it only as damages the Court will not order it to be paid in bankruptcy, as that which can be recovered only as damages cannot be proved under a commission; the usage of bankers to charge interest has not been considered as the same thing as a contract to pay interest; and they have never attempted to prove the interest of the said debts under bankruptcies.

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Lord Chancellor (during, and at the close of the argument,) said, he thought the interest due by contract, at least it became so after it was paid the first time; that when it was a contract for forbearance, and payments would be payments on that contract, for forbearance. If sued upon before any payment, the plaintiff could only have the interest in the shape of damages; but if the party has once contracted to pay the interest at such a rate for forbearance, it then is a debt by contract. Payment of a sum for interest would not be a liquidation of the debt, but a contract for future forbearance; and therefore as long as the money is forborne, so long the same rate of interest shall be allowed.

His Lordship therefore made the order that the petitioners be admitted to prove the interest (a).

(a) This petition was afterwards affirmed by Lord Rosslyn, upon a rehearing, *Ex parte Mills*, 2 Ves. jun.

295. For the subsequent cases, vide the note to *Ex parte Champion*, ante, 436.

S. C.

1 Ves. jun. 452.

Lincoln's-Inn

Hall, 20th April.

Exception will not lie to a master's report of the appointment of a receiver without shewing that the person appointed is improper.

### THOMAS v. DAWKINS.

AN exception taken to the Master's report of his having appointed *John Franklin* receiver of the estate of the defendant.

It appeared that the estate, of the value of about £400 a year, was in mortgage to the late Sir *Herbert Mackworth* for £11,000; that he was also a judgment creditor for £600; and that he had, in 1774, been appointed receiver, and since that time had paid off incumbrances (being younger children's fortunes) to the amount of £8,500; that Sir *Herbert* having died in the receipt of the rents and profits, and having appointed Lady *Mackworth* his executrix, it became necessary to appoint another receiver.

The defendant, *Mary Dawkins*, is entitled to the estate, subject to the incumbrances.

Upon

Upon the reference to the Master to appoint a receiver, Miss *Dawkins* recommended *John Franklin* to be receiver, Lady *Mackworth* recommended *John Morgan*, esq. of *Swansea* com. *Glanorgan*. The Master appointed Mr. *Franklin*, and had reported that he had done so.

To this report Lady *Mackworth* took the present exception, stating, that "she proposed and was desirous that *John Morgan*, who lives near and contiguous to the said estates, or the greatest part hereof, should be appointed receiver; the said exceptant having a great trust and confidence in him, and believing that he would do his utmost for increasing and improving the estates: and for that this exceptant hath not the same knowledge of, and confidence in *John Franklin*, who hath been appointed by the Master, and for that he lives remote from the said estates, or the greatest part thereof; for which reasons she prayed that the appointment might be set aside, and the said *John Morgan* appointed receiver."

Lord Chancellor, upon the exception coming on, asked whether this was a case for an exception; that he had understood the rule to be, that where a report succeeded confirmation there the party might except to it; but that in the case of appointing receivers, guardians, or maintenance, where the report never comes to be confirmed there it is uncommon to except.

Mr. *Lloyd*, in support of the exception, stated Lady *Mackworth's* interest, and that she, by bringing an ejectment, could, as mortgagee, enter into possession and appoint her own receiver.

Mr. *Mitford*, on the other side, said, that it was laid down as a principle that such exception would not lie, unless it was shewn, which is not pretended in the present case, that the person appointed by the Master was an improper person. This principle was laid down and proceeded upon in *Mitchel v. Hunter*, (*Creuze v. The Bishop of London*, ante, vol. ii. p. 253.) where Lord *Kenyon* had referred the matter back to the Master to state reasons, and his Lordship, on the matter coming on again, had thought the Master had done right.

Lord Chancellor thought Mr. *Mitford* right; and said the principle he went on was, that small discussions, as to who should be receiver and have the allowance, were not proper questions for him; where a Master has made a report of a receiver, in order to remove him, you should shew that he is an improper person for the purpose. In the present case the estate is liable to an unascertained charge to the *Mackworth* family. The interest of the owner of the equity of redemption seems fully equal to the other. And there is no danger of the mortgagee losing her money: under these circumstances, there is no reason to set aside the Master's report.

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The exception was therefore dismissed: but it being alledged that this might induce *Lady Mackworth* to bring her ejectment, and to take possession of the estate, it was ordered, by consent, that the receiver should, out of the first rents, keep down the interest of the incumbrances (a).

(a) See this case cited by Sir T. Ph-mer, in *The Attorney-General v. Day*, 2 Mad. 252. The report of the judgment is erroneous in two respects, 1st, in representing his Honor to have stated, that the present case was more fully reported in *Vesey*; and 2dly, that

it did not appear from this report, but that it did from Mr. *Vesey's*, who proposed *Franklyn*. For the general doctrine upon this subject, vide the Editor's note to *Cruze v. Lenth*, ante, vol. ii. 253.

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## EASTER TERM,

32 GEO. III. 1792.

## DIXON v. DIXON.

Rolls,  
26th April.  
Presumption of  
death of legatee.

A LEGATEE having been abroad 26 years, and not having been heard of for 25 years past his Honor said he would presume him to be dead (a).

(a) The mode in which Lord *Alvanley* proceeded in the present case, was approved of by Lord *Eldon*, in *Lee v. Willock*, 6 Ves. 606. where, under similar circumstances, the Master had stated evidence as to the death of the legatee without drawing any conclusion. The entry in the Register's book, is A. 1791. fol. 315. It appears that on the 22d June, 1790, it had been referred to the Master to enquire whether the legatee was living or dead, and if dead, when and where he had died, and who were his next of kin. The Master by his report, stated that from the affidavits which he recited, it appeared that the legatee had gone to sea about twenty-eight years before, and had been heard of about a year

afterwards in the *East Indies*, when he was very ill and had never been heard of since. On the 22d of February, his Honor referred it back to the Master to revise his report. Afterwards by a second report, bearing date the 27th of February, reciting the substance of the affidavits, the Master certified, that in consequence of its being twenty-eight years since he left the kingdom, and twenty-seven since he had been heard of, he was of opinion that he had died in the lifetime of the testator, whereupon a decree was made accordingly.

As to presuming payment of a legacy, vide *Jones v. Turberville*, post, vol. iv. 115. S. C. 3 Ves. jun. 11.

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1 Ves. jun. 453.

2 Dick. 762.

Lord Chancellor thought that, notwithstanding the words of the stat. 17 Ed. 2. s. 1. c. 9, 10. the Court has authority to order timber decaying on the estate of a lunatic to be cut; but did not absolutely decide the point, or whether the produce should be considered as real or personal estate.

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*Ex parte BROMFIELD.\**

**T**HIS was a petition of the personal representatives of *John Bromfield, Esq.* a lunatic (deceased), that the Accountant-general might transfer several sums standing in the public funds in his name to the credit of this account, to them. A part of these funds was purchased with sums of money, the produce of timber cut upon the lunatic's estate, by order of the Court, at the instance of his sister, who was committee of his person and estate; and upon the representation that it was in a state of decay, and damaging other timber, and injuring the soil through that state of decay.

The petition was opposed on the part of the heirs at law.

*Mr. Mansfield*, for the heirs at law.—The question is with respect to money produced by sale of timber, cut on the lunatic's estate, by order of the Court. The heir at law claims this money on the ground that his right is the same as if the timber had been still standing; in which case it would have descended with the estate to him. That his rights cannot be varied by the circumstance of the timber's being cut, appears from the cases *Ex parte Grimstone*, Amb. 706. and *Tullit v. Tullit*, Amb. 370. In those cases the timber had been cut without order; here it was cut by order of the Court, and the money produced by the sale paid into the Bank. Where such sale is made by order of the Court, it is to be considered on the same foot of property as if it continued timber. This doctrine is laid down by Lord Hardwicke in *Anandale v. Anandale*, 2 Ves. 381. The Court cannot, by its order, change the nature of the property of an infant or a lunatic. *Inwood v. Twyne*, Amb. 417. (a) Lord Northington there relied on the act of the infant after she came of age, by electing to have it considered as real estate. Besides, there the mother, who was the only next of kin, signed the petition, and consented to the money being invested in the purchase of real estate. There are not many orders to be found whereby timber has been felled and the property changed. The first instance we have been able to trace is in the matter of *Ann Hunt*, a lunatic, where Lord Henley made an order, 13th of March, 1760, upon the petition of the committees, that they should be at liberty to cut down and fell such dead, lopt, and decaying timber as they should be advised as necessary to be taken out, to bring the woods, coppices, and hedge-rows on the lunatic's estate into a proper course of husbandry; and all direc-

\* The reporter has not usually admitted cases to appear which have not received final judgment; but the importance of the present case upon the practice of the Court in a material instance, and the strong inclination indicated by what fell from Lord Thurlow, induced him to deviate from his accustomed rule.

(a) S. C. from Lord Northington's MSS. 2 Eden, 148.

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case of *Grimstone*, 2d of November, 1771, the timber was cut by the agent without the order of the Court. In *Calthorpe's* case, 31st of July, 1786, an order was made for selling and sale of timber, and that the produce should be paid into the Bank in trust, to the credit of the matter, under the title of Sir *Henry Calthorpe*, a lunatic, the timber account. In the matter of *Bevan*, a lunatic, 20th of March, 1771, Lord *Apsley* ordered the residue of money produced by the sale of timber felled by order of the Court, after payment of costs, to be applied in payment of the lunatic's specialty debts; which must be upon the ground that those debts would fall upon the real estate of the lunatic. The result from all these cases is, that wherever the timber is cut *without* order, the nature of the property is not changed. And where it is cut by the order, or with the approbation of the Court, there is no reason why the heir at law should not take the produce. In *Shelly's* case, the same person appears to have been heir at law and personal representative: at least the case passed without contest. The only cases, therefore, are those of *Inwood v. Twyne*, and *Ex parte Grimstone*.

Mr. *Solicitor-General*, Mr. *Lloyd*, and Mr. *Mitford* for the petitioners.—However it may be where the timber is felled without the order of the Court; wherever it is so *by order*, the produce belongs to the personal estate. There is no case in which the timber has been cut *by order*, where the Court has sustained the claim of the heir at law. In *Tullit v. Tullit*, the mother cut the timber by her own authority, and the produce was considered as real estate, because the guardian did not act by order, and there was no enquiry as to its being for the benefit of the estate. (*Lord Chancellor* observed that it appeared, by his note, that that case was against the opinion of the Master of the Rolls.) It is said in that case, that if the infant is tenant in tail, the cutting the timber shall vary his interest, not if he is tenant in fee. If it is for the interest of the infant, the Court will consider the property as changed. The Court will be influenced by the consideration, whether it is or is not for the interest of the infant. The case of *Mason v. Mason*, cited in *Tullit v. Tullit*, only shews that the Court exercises its judgment throughout. The case of *Tullit v. Tullit*, itself is a singular case, because the guardian there had contracted without the authority of the Court, and it did not appear to be for the interest of the infant. It may safely be stated that the Court will be jealous of permitting the guardian to vary the nature of the property. But here the Court having ordered the timber to be cut, has made it personalty. In *Inwood v. Twyne*, the Court was of opinion that the infant had acquiesced. It is said the Court can change the nature of the property by a decree. It certainly can do so, though it will not do it wantonly, and only where it is manifestly for the benefit of the infant. With respect to the cases, in the first, of *Ann Hunt*, the money, including that produced by the sale of timber, was ordered to

to be paid to the next of kin. In *Bevan's* case, the order that the money should be applied in payment of specialty debts, altered the nature of the property between the real and personal representatives, and was as much a conversion as any other. In the case of *Grimstone* the agent had cut the timber without order, and it was held the property was not altered; and the heir at law there found it necessary, in order to entitle himself, to state that it was cut without the authority of the Court, and upon the order, 8th of *August*, 1772, it appears that the residue, including the produce of timber, was paid to the next of kin. And your Lordship, in a case, *Ex parte Clarke*, 25th of *July*, 1787, made an order that the money, including the produce of timber cut by order, should be paid to the next of kin. So in *Shelly's* case, 1773, there the heir at law was ordered to attend; on the hearing of the petition, the Court ordered the money to be paid to the next of kin. In many cases the committee may change the nature of the property, as by applying timber to repairs. *Ex parte Ludlow*, 2 Atk. 407. *Sergison v. Sealy*, 2 Atk. 412. (d). In other causes, the Court has made such alteration, where manifestly for the interest of the infant, as in *Vernon v. Vernon*, where Lord *Shipbrooke* had given an estate to the infant, which lay intermixed with his own, on condition that the infant should pay as much to his personal estate as he had paid for it. And the price having been paid out of the personal estate of the infant, who died under age, your Lordship was of opinion that the personal representative had no claim, because the change had been made for the interest of the infant.

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Mr. *Mansfield* in reply.—With respect to the principle, there is no case that shews that timber cut upon a lunatic's estate becomes personalty.

*Shelly's* case passed entirely without argument, and by consent, the first application was made in the absence of the heir at law, and to the second he consented. None of the cases have decided that the produce does not continue in the nature of timber. The case of *Inwood v. Twyne*, was the case of an infant; in that of *Grimstone* it was certainly a benefit to the estate. There is nothing in the statute to authorise the application of personal estate to improve the realty. In the other cases cited there is nothing applicable to this. In *Vernon v. Vernon*, the only question was, whether an infant could take an estate on condition. In *Anandale v. Anandale*, Lord *Hardwicke* clearly means by the word *wrongfully*, all cases where the timber is cut without order of the Court. Except *Inwood v. Twyne*, there is not a case which even hints that the property can be changed. Then consider what is the authority under which the application of the money were reserved. In the case in which the Court acts (e). The words of the statute are, that the king

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(d) To which may be added *Kelly v. Kelly*, Gilb. 10.

(e) 17 Ed. 2. c. 10. the construction of which act is fully discussed in *Berkeley's case*, 4 Co. 123 b. The party to whom the care of the lunatic's possessions is

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king shall provide that the lands of the lunatic shall be kept "without waste or destruction." If we consider these words, we shall not wonder that the Court has acted with great delicacy on this subject. The lands are to be kept without waste or destruction, and *in no wise to be aliened*. The Court has no more right to cut timber than a tenant for life, impeachable for waste, would have. Such a tenant cannot cut timber if the remainder-man chooses to have it stand and rot. If it can be cut, when it is apparent the timber must be cut, it must still be considered as timber, and the heir must succeed to the money. But the lands are not to be *aliened*. To cut the timber is the same as aliening the estate. The timber may constitute its principal value. I mention this because the power of the crown is very different with respect to infants and lunatics. As to infants, it is part of the power of the crown, as general guardian: but with respect to lunatics it is a special authority. The case of the lunatic is therefore stronger than that of an infant against altering the nature of the estate: and it appears from the case of *Inwood v. Twyne*, that even in the case of an infant, the act of the party, without the consent of the Court, will not vary the nature of the property.

*Lord Chancellor* broke the case to the following effect.—It appears to me that the cases cited on this subject deserve more attention than I have been able to give them. If I was only to follow the principles of natural justice, I should find no difficulty: but it is argued that, by the statute, the Court has no authority to act in this manner upon the lunatic's estate: and according to the argument, the court can on no occasion, apply the timber upon the lunatic's estate to the personal use of the lunatic; so that it cannot apply the timber to the payment of his debts, or even to preserve him from a jail, and this because the statute has said that their lands shall be kept "without waste or destruction" and "shall in no wise be aliened." It is said that a lunatic, though he has a large estate, is reduced by the statute to the situation of a tenant for life; but I cannot assimilate (in my mind) the situation of a lunatic with a mere tenant for life. The statute, I think, must be construed to mean, that the lands shall be kept, without destruction, in the same manner that the owner of them would keep them if he were of the same mind. If this be the true construction of the statute, I cannot distinguish between the case of a lunatic and an infant.

It is extremely clear, that, at the time of the death of the lunatic, this money was part of his personal property. It would have been

is delegated by the crown, is *there* considered as a mere bailiff, and cannot cut timber but for repairs, p. 127 b. *ibid.* 2 Vern. p. 92. *Ardley v. Ardley*. Personal property, though laid out in land by the committee of the lunatic, shall, upon his death, be held as personalty, and go to the executors, if he had made a will during sanity, or his next of kin, if intestate.

considered

considered as such upon a plea of *plene administravit*. It would have been so for the purpose of paying his debts. It seems difficult to say how the heir at law can claim it against his personal representative. I doubt whether he can have any equity to recal it out of his hands; he cannot do so on any ground but upon some equity arising from its having been improperly converted into personalty. And probably if a committee had wantonly, and of his own head, so converted it, the Court might have thought that such a fraudulent management and breach of the confidence reposed in him, of the lunatic's property, as to raise an equity for the heir at law. I think I remember a case where a stranger had cut the timber belonging to the lunatic, and the Court there thought, as there was no breach of confidence, that it was like the case of a windfall, and that no equity arose to the heir at law. I think it impossible to say, that where the Court has, for good and substantial reasons, thought proper to change the nature of the property; I have no conception that, in such a case, any equity can arise to the heir at law. It is perfectly indifferent which way it falls; and therefore he can have no equity to recal it from the personal representative. The Court have thought proper to charge the property, and they have done so on reasons which exclude all hardship from the case of the heir; at the same time, I think that the Court ought to act with great care, and only in urgent occasions.

If the property, on the present occasion, is sufficiently considerable to afford it, I could wish to decide this in such a way, that, if I am wrong, it can be corrected; if the property is not sufficient to afford a bill, I must decide it in this way; but, in that case, I must consider the cases further.

I have observed, that where a charge is paid off, or a mortgage redeemed with an infant's personal property, it is ordered, that it be considered as personal estate, for the benefit of the infant; but I do not remember any such order made with respect to timber cut on the infant's estate (a).

(a) A bill was afterwards filed, for *Oxenden v. Lord Compton*, post, vol. the proceedings upon which, vide iv. 231. S. C. 2 Ves. jun. 69.

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## CATHCART v. LEWIS.

THE bill stated that *William Lewis*, the defendant, was indebted to *John Esdaile*, and that he brought an action against the defendant in *Jamaica*, where the defendant then resided, and in 1780 obtained judgment against him there, that *Esdaile* afterwards assigned that judgment to the plaintiffs. It further stated, that the

of the estate to a trustee, for fraudulent purposes; demurrer allowed because the bill ought to have stated the effect of the judgment in *Jamaica*.

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defendant

S. C.

1 Ves. jun. 463.

Bill stating plaintiffs to be judgment creditors in *Jamaica*, and that there were prior judgments and a conveyance

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defendant *Lewis*, being indebted to the plaintiffs in *Jamaica*, plaintiffs brought actions there, and recovered judgment, and that the whole debt still remains due. That *Lewis* by lease and release, dated in 1784, conveyed his plantations in *Jamaica* to trustees, who are defendants in trust, to pay him £3,000 a year; that *William Lewis* resides in *France*. That there are prior judgments to those of plaintiffs. That the defendant *Matthew Lewis* is now in the possession of one quarter of the plantation, upon the trusts of the deed of trust, and that he has large sums of money in his hands belonging to *William Lewis*; and therefore prayed that the defendant *Matthew Lewis* might be decreed to pay to the plaintiffs what is due to them upon their judgments out of the cash in his hands.

To this bill the defendant put in a general demurrer.

The plaintiff's counsel not being in Court, Lord Chancellor directed Mr. Steele, who supported the demurrer, to go on.

He contended there was, on the face of the bill, no equity against the trustee. It only appears that the plaintiffs were judgment creditors, and creditors, by assignment, of judgment creditors of *William Lewis*.

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Mr. Selwyn for the plaintiffs.—The trust of the deed is, in the first place, to pay *William Lewis* £3,000 a year, then to pay certain debts; but there is no provision in the deed to pay the plaintiff's judgment debts, and the defendant is gone abroad. It is stated that the trustee has money in his hands; and as the judgment would be a lien on the land, the produce of the land ought to pay these debts.

Lord Chancellor, at the first opening, thought there was a defect of parties; that the assignors of the judgment ought to be before the Court; but, at the conclusion of the argument said, that being a judgment in *Jamaica*, the bill should have shewn its legal effect there. If it is the same with that of a judgment here, the lands are open to you, and you may take them by an *elegit*; you say, by your bill, that they are protected by other judgments; but that is no head of equity.

*Demurrer allowed.*



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## MOGGRIDGE v. THACKWELL and Others (a).

S. C.

1 Ves. jun. 464.

**N CAM**, of *Battersea*, in the county of *Surrey*, spinster, made her will, dated 16th of *June*, 1779, and thereby, after giving of certain real estates, she gave all the rest of her real estates to the plaintiff *John Moggridge* and *James Vaston*, charged with several annuities, and among others, with an annuity of £15 *per annum*, to *Ellen Pheasant*, her late servant; and she also, by other legacies, gave to her servant *George Elliot*, £200, and otherwise provided for by her in her life-time; she then gave to *Asylum Hospital* £500, and other pecuniary legacies to others; and she gave all the rest and residue of her personal estate unto *James Vaston*, his executors, and administrators, *desiring him to dispose of the same in such charities as he should think fit, recommending poor clergymen who have large families and good characters*, and appointed the said *John Moggridge* (the plaintiff) *Mr. Vaston* beforementioned, executors, and desired *Robert Ford*, esq. and *Mr. Richard Wycherley* to aid and assist her executors.

Gift on residue to J. V. to such charitable uses as he should appoint, recommending poor clergymen, &c. J. V. dies in the life-time of the testatrix. The charity shall be sustained and executed by the Court (f).—Two codicils, nearly the same (though with a legacy in the one, not in the other) held to be explanatory, not duplicative.

The testatrix afterwards made four codicils to her will, dated *April* and 10th *May*, 1780, and 28th *April* and 2d *May*, the first of these was, in these terms: "A codicil to my last will and testament, which I desire may be taken as a part and parcel thereof: I give to *Peter Triquet*, Esq. £100; to *William Pollock*, Esq. £100; to *Elizabeth Thackwell*, eldest daughter of *Thackwell*, of the parish of *Bertow*, in the county of *Wor-* £600, *3 per cents*, with the dividends to be accumulated from my death to the time she shall attain the age of 21 years; to *Robert Woodford*, Esq. I give £500; to *Judith*, the second daughter, I give the sum of £600 stock, with the interest that shall be accumulated when she attains the age of 21 years; and to the four youngest daughters of the said *John Thackwell*, *Margaret*, *Mary*, *Elizabeth*, and *Nancy*, I give £400 each in stock, with the interest that shall accumulate till they arrive at the age of 21 years, and if they die before they attain the age of 21 years, then that child or children's portion shall be divided amongst the rest of the other children; to *George Elliot* I give £100, over and above what I have given him in my will. In witness whereof I have hereunto set my hand and seal this 12th *April*, 1780."

The second codicil was in these terms: "A codicil to my will, and I desire may be taken as part and parcel thereof: and I give to *Peter Triquet*, Esq. £100; and the same to *William Pollock*,

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(f) *Attorney-General v. Downing*, Ambler, p. 550.

(a) Reg. Lib. B. 1791. fol. 466.

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Esq.; I give to *Elizabeth Thackwell*, eldest daughter of *John Thackwell*, of, &c. £600, 3 per cent. Bank annuities, consols; and I order my executors to accumulate the dividends thereof for her benefit, and the principal and such accumulation to be paid to her on her arrival at the age of 21 years; the same to *Judith*, another daughter, on the same terms; and I give £2,000, 3 per cent. Bank annuities, consols, to the other daughters of the said *John Thackwell*, equally to be divided between them, as shall be living at the time of my decease, but on the same terms as their other sister's legacies and accumulations are ordered; but my will is, that if any one of the daughters of the said *John Thackwell* shall die before their respective attainment of 21 years, I order each daughter's legacy, with the accumulations, to be equally divided amongst her surviving sisters; I give to *Ellen Phasant* £5 per year, during her life, more than I have given her by my will; and I give to my servant *George Elliot* £100 more than I have given him by will, provided he shall be in my service at the time of my decease. In witness, &c." The third codicil was: "I desire, after my death, that if my servant *George Elliot* likes to continue at *Dymocke*, he may be retained, with a salary of £50 a year, to do all the business, that is to be done in the country, which I think will be of great use to the executors. By the fourth, she desired that *George Elliot* might have £20 in lieu of what might be owing to him on the face of the books, and that his account might be taken, as she had not the least doubt of his integrity. The first codicil was in the testatrix's hand-writing, but interlined by *Mr. Woodford*, in whose hand-writing the second codicil was.

*Ann Cam*, the testatrix, died 6th of February, 1790, without revoking or altering the will otherwise than by the codicils. *James Faston*, who was appointed co-executor with the plaintiff, (and sole trustee with respect to the charities,) died in 1781, nine years before the testatrix (and it was in evidence, that she had early notice of his death) and the plaintiffs proved her will, and took upon himself the execution thereof, and possessed the personal estate of the testatrix, to an amount much more than sufficient to pay all her debts, legacies, and funeral expences.

Doubts arising with respect to this will, particularly with respect to the gift of the residue to *Faston*, to dispose of to such charities as he should think fit, and the double legacies given to the same persons, by the first and second codicils, the executor filed this bill against the legatees next of kin and the Attorney-General, praying that the rights of the parties might be ascertained, and for proper directions and indemnity.

The legatees, by their answers, claimed their legacies, and in particular, the defendants, to whom legacies were given by the first and second codicils, claimed both legacies. The next of kin claimed the residue as such; and the Attorney-General put in the common answer.

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The cause came on to be argued this term, when Mr. Hardinge and Mr. Ainge, on behalf of the plaintiff, stated the case, and submitted the questions to the Court.

Mr. Attorney-General, and Mr. Stanley, (in support of the gift of the residue to charitable purposes,) insisted, that notwithstanding *Vaston*, who was to administer then, was dead in the life-time of the testatrix, yet there being a general intention to give to charitable purposes, the gift itself was not void; but the appointment had devolved upon the crown, or upon the Court. To prove this they cited the case of the *Attorney-General v. Syderfen* (a), 1 Vern. 824, where the testator charged a manor with £1,000, to be applied to such charitable uses as he had by writing under his hand formerly directed, and no such writing was found; the Court decreed the charity to be established, and the appointment to be in the Crown; and the Lord Keeper there cited a case of *Frier v. Peacock*, where the testator devised a surplus for the good of poor people for ever, and the charity was established. As the want of the paper was supplied in the case of *Syderfen*, so here the death of the person to appoint shall not defeat the gift. In the *Attorney-General v. Hickman*, 2 Eq. Cas. Abr. 193, it was a gift to B. for the use of non-conforming ministers, at the direction of C. and D. At the death of the testator, B. C. and D. were all dead, yet the Court sustained the legacy. In *White v. White*, (ante, vol. i. p. 12.) the gift was to such lying-in hospital as his executor should appoint; the testator afterwards struck out the name of the executor, yet the legacy was sustained. In *Doyley v. The Attorney-General* (b), 4 Vin. 485. plea 16, it was a gift to trustees to certain uses, and subject to them, to dispose of the real and personal estates to such of testator's relations of the mother's side, who were most deserving, and in such manner as they thought fit; and for such charitable uses and purposes as they should think proper and convenient: one of the trustees declining to act, was decreed to assign over; and the Master of the Rolls held clearly, that the limitation over of the personal estate was good, and that the power given to the trustees of distributing the testator's estate, was at an end, and could not be assigned over; and that therefore the power of distributing the same devolved on the Court. In *Widmore v. Woodroffe*, (ante, vol. i. p. 13, n.) there was a gift of one-third part to "some public charity;" this was held to be sufficiently certain, and the legacy good; but the executors were to dispose of it under the eye of the Court, and therefore were to propose a charity to the master. Here the testatrix has pointed out poor clergymen, having large families, and good characters, as the objects of her bounty, which is a very sufficient object;

(a) This case is stated by Lord Eldon, from the original papers in *Christ's Hospital*, 7 Ves. 71.

(b) See this case, of which the cor-

rect name is *Doyley v. Doyley*, and *The Attorney-General v. Doyley*, stated from the Register's book, 7 Ves. 59.

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and it is fully established, that where the object is sufficiently pointed out, though the person who is to administer the charity is removed, the charity must be appointed by the crown.

Mr. *Solicitor-General*, Mr. *Mansfield*, Mr. *Mitford*, Mr. *Preston*, and Mr. *Wilson*, for the next of kin, and persons in the same interest :

The circumstances of this case vary from any of those in the books. It is a gift of real and personal estate to *Moggridge* and *Vaston*; subject to certain trusts, appointing them executors, and desiring certain persons to assist those executors. The gift of the residue of the personal estate, is not to the same persons, but to *Vaston*, his executors and administrators, desiring him to *dispose of the same in such charities as he should think fit*; recommending poor clergymen, who have large families, and good characters.

Where the charity intended by a testator, is clearly defined, it is true the death of a trustee will not prevent the *cestui que* trust from taking. Here *Vaston* died in 1781, the testatrix died in 1790. Upon her death two questions arose: 1st, Whether she had given this residue to any charity: 2d, Whether the codicils have given double legacies. With respect to the first, none of the cases are like the present. The distinction in this case is the same as was in view in *White v. White*, (ante, vol. i. p. 12.) that the person entrusted with the execution of the legacy, not having lived to perfect it, the legacy falls to the ground. In that case, it was a gift to *such lying-in hospital as his executor should appoint*, and an executor was named; afterwards the testator struck out the name of the executor, and did not appoint any other: It was argued that this was not a gift to any lying-in hospital; but there being, in that case, a specific kind of charity pointed out, the Court sustained it. Here the gift is general, to such charities as he shall think fit; and though he would have been obliged to give it to some charity, he had it fully in his power to give it to what charity he pleased; and being dead, it is wholly uncertain to what charity he would have given it. In *Wheeler v. Shere*, Mosely 288. 301, there the executors were to employ the residue to such charitable uses as, by codicil, the testator should appoint: The testator made several codicils, but never appointed any charities; and Lord Chancellor said, that "where a man devises to such charitable uses as he had appointed, that supposes he had made an appointment, though it could not be found: but here it was plain, the testator had made no appointment; by the codicil, he confirmed his will, and made the trust of the surplus more extensive; it was to be in trust for a charity, if he directed any;" and the Court there would not make an appointment of the charity. It is difficult to distinguish that case from this. Here the testatrix did not give the legacy to any particular charitable purposes, but left it to the executor personally to make the appointment. Then she must have it in contemplation that he must either

either survive her, or die in her life-time; and although he dies in her life-time, and she had notice of it, she still leaves the power of appointment personally in him, who she knew could not execute it; therefore it does not appear that she died with the intention that it should be so distributed. The gift of the power lapses by his death, as much as an estate given to him would have done; because it has become impossible he should appoint, and she did not mean the confidence to go to his representatives.

The case of *The Attorney-General v. Syderfen*, also admits of a distinction. That was the case of a charge. We admit it to be a strong case, but in the original gift nothing was left incomplete; it does not appear what had become of the writing, but there is not the least evidence that the testator had destroyed it, as his destroying it would have been a revocation. All the Court said was, that where the testator has given to charitable uses, the gift shall be supported; but they did not say this shall be the case where there is no gift. *The Attorney-General v. Hickman*, 2 Eq. Cas. Abr. 199, is also distinguishable from the present case; that was a gift to B. for the use of non-conforming ministers, with the advice of C. and D. It was contended, that it was a personal trust, and had failed by their deaths; but Lord Chancellor said, the charity was still subsisting. But in that case, the objects were defined by the testator. In *Doyley v. The Attorney-General*, the Court held the new trustee to be within the directions of the will. But it is very different where the trustee survives the testator, from the case where he dies in the testator's life-time, and with his full knowledge of the fact. In the present case there is no designation of any charity, to which the executor would be bound to apply this fund, as there has been in all the other cases. It is to *Faston*, to such charities as he should think fit; so that the first question is, whether there is any trust at all; for although a recommendation will raise a trust, it will only do so where the subject to be applied is certain, and the object to which it is to be applied is certain also. Though the legacy is given to him, his executors and administrators, that only shews their interest, it will not carry the power to the executors and administrators; there is nobody but he himself can execute the trust. It would be impossible he should have exercised it if he had survived her, but had died immediately after, and she meant to take the chance whether he would survive her or not. With respect to the objects pointed out, they are *poor clergymen*; it is by no means so clear as *non-conformist ministers*: and although she recommends poor clergymen, he might have applied it otherwise, without being guilty of a breach of his trust; the words are not imperative, or sufficiently certain to create a trust, within the requisitions of the case of *Harding v. Glyn*, 1 Atk. 469, and the other cases on the subject; not being given to particular persons, but to such persons as he should appoint, who can now make no appointment, and could make no appointment many years before the testatrix's death.

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In *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61, there was no gift but through the medium of Lady Sunderland: so here there was no gift but through the medium of *Vaston*. In the case of *Widmore v. Woodroffe*, the gift was to some public charity; it was said, that was a gift to all public charities, and the election only in the executors. In *The Attorney-General v. Glegg*, Amb. 584, two of the executors, to whom the choice of objects was given, were dead; and though the gift was supported in that case, it should seem, that if the third had been dead also, that the trust would have been at an end; yet the direction in that case was not so large as in the present. In *Hibbard v. Lambe*, Amb. 309, where new trustees were appointed to sustain the charities, it was laid down by Lord Hardwicke, that only the surviving executor could appoint the objects; so that had he been dead, the whole must have failed. In *Brown v. Yeall* (a), the residue was to be applied to the purchasing of such books, as "disposed of under the following direction might have a tendency to promote the interests of virtue and religion, and the happiness of mankind;" and then directed this charitable design to be executed under the direction of such persons, and under such rules, as by any decree of the Court of Chancery, should be directed; your Lordship held this gift to be void, for uncertainty. The gift here being to *Vaston* himself, who is dead, and to be distributed in uncertain charities, must, upon the whole, be void.

Then with respect to the several codicils, whether they are duplications of the legacies, or mere repetitions. The two, upon which the difficulty arises, are those of the 12th of *April*, and the 10th of *May*, 1780; and that of the 10th of *May* seems to be a mere substitution of that of the 12th of *April*: that of the 12th of *April* is the original codicil, it is in her own hand-writing; the corrections and interlineations are in the hand-writing of Mr. *Woodford*, in whose hand the second codicil also is. What is laid down in the cases on the subject of duplicated legacies, only applies where there is no evidence of the testator's intention; the rule laid down by Mr. Justice *Aston*, in *Hooley v. Hatton*, (cited in the note to *Ridger v. Morrison*, ante, vol. i. p. 389.) is, that where there is a gift of two legacies, without any evidence of the testator's intention, the presumption is, that they were intended to be doubled. But here, the will and codicils afford evidence to the contrary. The will gives *Ellen Pheasant* £15 a year; she is not mentioned in the first codicil: the second codicil gives her £5 a year more than I have given her by the will. She had by will given *George Elliot* £200, by the first codicil she gives him £100 more than she had given him by the will: by the second codicil she repeats the gift £100 more than she had given him by the will; she could not mean more than she had given him by the will and codicil. The same, with

(a) Before Lord *Thurlow*, upon further directions, in *Lincoln's-Inn Hall*, July 1791, it is stated from the Register's book, 7 Ves. 50,



the gifts to the *Thackwells*. They seem little more than repetitions. In short, except the £500 given by the former codicil to Mr. *Woodford*, which is not in the second, the second is nearly a copy of the first. The omission might be a delicacy in Mr. *Woodford*, who might not chuse to insert that legacy in a codicil drawn by himself, but to leave it in her hand-writing. It seems as if he had begun altering the former codicil, but had found the paper would not admit of it; and had therefore drawn the second codicil.

The matter of the codicils affords evidence that she did not mean to duplicate the legacies. Where one codicil is so mere a repetition of the former, it has been held not to be a duplicate of the legacies; as in the case of the *Duke of St. Alban's v. Miss Beauclerk*, 2 Atk. 636, where the fourth codicil was held to be a mere substitution for the first; and lately in *Cootte v. Boyd*, (ante, vol. ii. p. 521.) where your Lordship held, that one legacy having been inserted, did not shew that the remainder of the second codicil was not intended as a repetition of the first. That case is so similar to the present, that it is hardly to be distinguished from it. Under the authority of the cases, therefore, these are not accumulative legacies.

Mr. *Selwyn* and Mr. *Sutton*—for the defendant *Pollock*, who claimed £100 under each of the codicils.—It is admitted in this case, that there is a very large residuary fund.—But it is suggested that the second codicil is a substitution for the first. The first codicil is in the testatrix's own hand; and it seems to be as good, in point of form, as that drawn by Mr. *Woodford*. He has made several alterations in the first draft, but he certainly did not mean the second as a substitution; for by that he would have deprived himself of the legacy, and if he had so intended, he would have instructed the testatrix to have destroyed the former; instead of which they were all found tied up together with the will, which shews her intention that they should all have their effect.

The general rule is quite clear in the roman, the canon, and the common law, that if the legacy be repeated in the same instrument, it is not doubled; if in different instruments, it is a duplication of the legacy, unless the same reason is given for the second legacy. The rule is so laid down by *Godolphin* in his *Orphan's Legacy*, p. 3. c. 26. s. 46. Swinb. 526. In the present case, no reason is given for the legacies. In *Wallop v. Hewit*, 2 Ch. Rep. 37, and in *Foy v. Foy*, 1st of February, 1785, (ante, vol. i. p. 390, n.) it was held that the repetition of the legacies in the codicils, were duplicative of the legacies. The case of *Cootte v. Boyd* went upon the singular circumstances of the case, which your Lordship thought sufficient to shew that it was not the intention of the testator to double the legacies; and that the codicil was only made for the purpose of introducing Miss *Moncton's* legacy; and your Lordship particularly relied on the repetition of the residue. The case of the

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the *Duke of St. Alban's v. Beauclerk*, is very different from the present. There, specific things were given twice, which shewed the last codicil to be meant only as a repetition of the former. Lord *Hardwicke* went upon that ground, and upon the residuary legacy being repeated. The circumstance principally relied upon, on the other side, is the repetition of the legacy to *Elliot* in both codicils in nearly the same terms; but it does not follow that if it is a repetition with respect to *Elliot's* legacy, that it is so as to the whole.

Mr. *Burton*, for *Brooks* and *Elizabeth* his wife, (late *Elizabeth Thackwell*) others of the *Thackwells*, and *George Elliot*.—That the presumption is in favour of double legacies, where they are in different instruments, and without a particular cause, appears by the citations from *Swinburne* and *Godolphin*, and the other cases cited. Admitting that where the codicils are particularly alike, they may be deemed repetitions, it is not improbable here, that with the large property of the testatrix, and that the *Thackwell* family were her next of kin, she might mean to give £1,200 to the eldest two daughters, and £4,900 to the others. The legacies are given differently; under the first codicil, if the eldest died under twenty-one, the legacy would lapse; under the second it would survive. With respect to *Elliot*, he has £200 under the will; by the first codicil he has £100 given him over and above what was given by the will; in the second codicil, he has also £100 given him over and above what was given in the will. In the will, a particular attention is paid to him; and also in the third codicil, where she wishes him to stay upon the estate, at a salary of £50 a year, which she thought would be of great use to the executor. Besides these, there are considerable variations made by the codicils. In the first codicil, Mr. *Woodford* has a legacy of £500, in the second this is omitted; yet, if he had survived the executrix, he must certainly have taken the £500. So *Ellen Pheasant*, who, by the will was to have £15 a year, by the second codicil took an additional £5 a year, which is a mark of increased affection. The first, third, and fourth codicils, are all of the testatrix's own hand-writing. If Mr. *Woodford* was entitled to his legacy, it does away with the objection of the second codicil's being a mere repetition of the first.

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Lord *Chancellor* expressed himself to the following effect:—The question is, whether these legacies given by the second codicil, are additional legacies; or merely a repetition of those before given by the former codicil.

The general rule is, that where legacies are given by two distinct instruments, they shall be looked upon as additional legacies, unless there appears upon the face of the instrument, an intention of the testator to the contrary. I am sorry to say, that the determinations have

have gone upon very indistinct principles. 1st. It has been said, that the legacies are additional, because there was no reason for making a second instrument, unless there was an intention of adding to the legacies: but this rule is subject to be checked, where it appears that the second are mere repetitions of the first, and then they shall not be construed as additional. Where circumstances afford presumption that they were mere repetitions, it is a stronger probability that they were intended as the same legacies. It is proper, therefore, to consider the legacies, which in the present case are repeated, as well as those which are added. The codicils in this case are clearly different, because there is a legacy in the first to Mr. *Woodford*, which is not adeemed or repeated by the second: which shews that the second codicil was not intended as entirely a substitution for the first. If it was a repetition, it was so because it purported to repeat the legacies and explain them. His Lordship read the legacies as given in the two instruments; and observed that upon that to the *Thackwells*, that in the first codicil it was so loose, £600 stock only being mentioned, that it would be uncertain, unless you could gather from some other part of the will, what stock was intended; and that this was explained by the second codicil, where it was pointed out to be three per cent. consols: he also observed, that these legacies were the same in effect, yet there was a difference as to accumulation; and the phrase in the former codicil was corrected. Of the legacies to *Triquet* and *Pollock*, he observed, they were almost exactly repeated; and with respect to *Elliot*, that the testatrix had added, "provided he be then in my service," and went on. It has been contended that, by the reference being to her will, she meant the legacies only to be added to what she had given by her will, not by the codicil also. I think that if she had given different legacies, or had assigned different reasons for them, they would have been additional legacies, both to those given by the will and the codicil also; but that having given the second legacies in such a way only as explains what she meant in the first codicil, it shews that she meant them only to be additional to what she had given to the same persons by the will. It seems by the same hand that made the interlineations in the first codicil (Mr. *Woodford's*) writing the second codicil, that he had attempted to alter the first, but found from the paper that he could not do it, and therefore wrote the second; the omission of the legacy to himself might be from delicacy, and that he wished that to remain in her own hand-writing. I think, therefore, upon the reasoning of all the cases, in which it is argued upon the ground that there is no reason for the second instrument but for the purpose of adding the legacies, that in this case, there being a good reason (that of explaining the first) I cannot consider these legacies as being additional ones to those given before (a).

(a) The cases upon the subject of double legacies are collected in the Editor's note to *Ridges v. Morrison*, ante, vol. i. 389.

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As to the second question ; if the cases upon the subject were not so clear, I think it would bear some reasoning, it is a gift of the “ residue to *Vaston*, desiring him to dispose of it in such charity as he should think fit, recommending poor clergymen, who have large families and good characters.” There has been some argument upon the effect of these words, and whether they are precatory or jussory, but it is perfectly clear that *Vaston* could not claim this property for his own use. All the rules both of the civil or common law would repel him from taking the property in that way. He could take it only for the purpose of charity. Then, he must be a trustee ; it is the same as if she had given it to a certain charity, naming him as a trustee : then the circumstance of his being dead in the life-time of the testatrix, or the length of time that he had so been dead, cannot govern the effect of the will ; if it could, there might be a total end to dispositions by will. This reduces it to the common case of the death of a trustee, which cannot defeat the effect of a legacy. Then can I say, that this legacy is not sufficiently distinct to bind the property ? The most general gift to charitable purposes has been decreed to be carried into execution, and the trustees not being alive to administer the charity, cannot defeat the intention. Here she has pointed out clergymen as the objects of bounty, which is sufficiently distinct ; but it must be referred to the Master, to whom a scheme must be proposed for the execution of the charity (a).

(a) The decree, as it was finally pronounced, upon a motion to vary the minutes, declared that the residue of the testatrix’s personal estate passed by the will and ought to go and be applied in charity, regard being had to poor clergymen with good characters and large families, according to the recommendation in the will ; and that the Master should approve of a scheme to effectuate the purpose of the said charity, with liberty for the parties to lay proposals before him, and costs were given as between attorney and client.

The residue amounted to £50,000, and a scheme (the particulars of which are given 7 Ves. 39.), was submitted by the plaintiff and approved by the Master. Upon the cause coming on for further directions upon the report, Lord *Rosslyn* intimated, that the decree, so far as it respected the charitable disposition, should be reheard : in consequence of which intimation, the cause was reheard before Lord *Eldon*, when, after a full and anxious discussion, both at the bar, and from the bench, of all the cases upon the subject ; his Lordship, (as he has since observed, 1 Meriv. 92.) entirely

by the force of precedents, and much against his inclinations) affirmed the decree, 7 Ves. 36. and that determination was afterwards affirmed by the House of Lords, 13 Ves. 416. The subject has been again very elaborately discussed in the late case of *Mills v. Farmer*, 1 Meriv. 55.

The doctrine established by all the determinations, as collected in these two cases, is, that a disposition in favour of a charity, is not to be construed according to the rules which are applicable to bequests to individuals : a distinction proceeding partly on principles in the Roman law, not at present perfectly comprehended, and partly on the religious notions which formerly obtained in this country, according to which it fell to the ordinary’s province to distribute in case of intestacy. And therefore where the testator has evinced a general intention in favour of charity, but has left the mode in which it is to be carried into effect, uncertain, that intention will be carried into execution.

In the present case it was ably contended on the appeal on the part of the Attorney-General, that the bequest was of that general nature, that the disposition

l to the crown, and was not to be determined by the Court; upon which *Wheatley* adopted the distinction has since been adhered to, *The Archbishop of Canterbury*, 364. that where the charitable trust is through the medium of trustees, whether all the trustees are dead; or being dead, the discretion is wholly or partly gone; or surviving trustees refuse to act; or some declining to act, and the others remain all those cases the Court directs the fund by means of a scheme; where the object is charity without interposition, the constitution, in the language of Lord Chief Justice, finds a trustee in the king, as

*parens patriæ*, who executes it by sign manual, exercising a discretion with reference to the intention of the testator.

There have been some cases, one of them well known by the name of the case of *Wheatley Church*, in which the *cy pres* doctrine had been said to have been carried to an improper length, and therefore it was holden, that where the gift was for a particular charity, which from circumstances, could not be applied, it should not be applied to another lawful use, the general intention in favour of charity not being there to be inferred, vide *The Attorney-General v. Goulding*, ante, vol. ii. 428.

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## BAYLEY v. The Corporation of LEOMINSTER.

Indenture of the 25th of *August*, 1739, between the bailiffs and capital burgesses of the borough of *Leominster*, of the one part, and *Penelope Bangham*, of the other part: the bailiffs and burgesses, in consideration of the surrender of a former lease of the premises for three lives, and also in consideration of £4, by the said *Penelope*, demised certain premises therein mentioned, unto the said *Penelope*, her executors, administrators, and assigns, from the day of the date thereof, for the term of 99 years, the said *Penelope Bangham*, and *Mercy Bangham* her daughter, or either of them should so long live, at the rate of 12s. a-year; and the bailiff and burgesses covenanted, "that they and their successors, when and as often as either of the said lives should die, and there should be only two lives remaining in the premises, if the said *Penelope Bangham*, her executors, administrators, or assigns, should, within the space of six months next after the decease of such life, or at the first or second chamberlain's court should be held after the expiration of the said six months, pay for a new lease of the said premises, and pay the sum of £4 to the said bailiff, &c. with six months interest for the said £4 after the rate of £5 per cent. the said bailiff, &c. should add a third life in the said premises, and grant to her or them a new lease of the said premises, to commence from the time of such payment, if the said other lives, and such third life as should be nominated by the said *Penelope Bangham*, her executors, &c. or either of them should so long live, under the like rents, covenants, and agreements, as the several uses and trusts thereinbefore declared, and so from time to time for ever after, as often as the case should so happen."

'S. C.  
1 Ves. jun. 476.

A covenant in a corporation-lease to renew, upon the falling in of one life for ever: there is no equity to extend it to the case where two are suffered to fall in, although a compensation is offered.



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pen." In 1745, this lease was made the subject of a settlement on the marriage of *Adam Ward* with *Mercy*, the daughter of *Penelope Bangham*, and was thereby conveyed to uses which have long since determined. There were several renewals, in consequence of the death of persons on whose lives the said lease, and the renewed leases, were made. Some time before 1764, *Penelope* died intestate, and administration of her personal estate was granted to her daughter *Mercy Ward*. In 1763, there was a new lease, on the decease of one of the lives; and the lives for which the lease was then granted, were *Adam Ward*, *Mercy* his wife, and the plaintiff's: and in 1764, *Adam Ward*, and *Mercy* his wife, assigned the beneficial interest in the lease to the plaintiff, in consideration of the sum of £312, and their trustees conveyed to him. The plaintiff entered under the assignment, and has considerably improved the premises. *Adam Ward* died in 1781, but no new life was added in his room, or new lease executed by the corporation, no application being made by the plaintiff for that purpose; *Mercy Ward* died in 1789, or the beginning of 1790, and after her death (there being then only his own life remaining in the lease) the plaintiff applied to the corporation for a new lease for 99 years, determinable on the death of the survivor of the plaintiff, and two other persons to be appointed by him, offering to pay to the defendants £4 with interest from the death of *Adam Ward*, and also £4 as a fine for renewal, on the death of *Mercy Ward*, and a further sum of £4, upon a supposition that if plaintiff had renewed said lease on the death of said *Adam Ward*, by putting in another life, such other life might have fallen in between the death of *Adam Ward* and of said *Mercy Ward*. This the corporation refused, insisting, they were not bound by the covenant to renew upon the falling in of two lives; but offered to grant to the plaintiff a new lease for 99 years, or three lives, upon his paying a fine of £100 for such new lease, and a fine of £34. 10s. upon the death of one life; which terms the plaintiff not choosing to comply with, he filed the present bill, praying that the defendants might be decreed to grant him a new lease of the premises for 99 years, or three lives, upon the terms of his offer.

The defendants, by their answer, admitted the facts, and the tender of £16. 16s. as a fine for renewal, and insisted, that no application being made till after the falling in of the second life, though the plaintiff must have known of several corporation meetings, they were not bound to renew but upon their own terms.

Mr. *Solicitor-General* and Mr. *Ainge*, for the plaintiff, contended—that although the covenant was only to renew upon the falling in of one life, that the spirit of the covenant extended to the case of two lives falling in; that the case lay in compensation, and that no forfeiture is to be incurred when compensation can be made.

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Lord Chancellor said the cases upon *Irish* leases, in the House of Lords, went the whole length of this case; but the plaintiff was not bound to renew upon the falling of one life; he had his election, whether to renew or not, and has made that election; the Corporation therefore are not bound now to renew. It has been determined over and over in the *Irish* cases (a).

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*Dismissed the Bill (b).*

(a) Vide *Raustone v. Bentley*, post, vol. iv. 415, and the note to it, where the *Irish* cases are collected: and as to the general doctrine upon the subject of covenants for perpetual renewal, vide the Editor's notes to *Redshaw v. The Corporation of the Bedford Level*, 1 Eden, 346, and *Tritton v. Foote*, ante, vol. ii. 636.

(b) With costs. Reg. Lib. A. 1791. fol. 298. A motion was afterwards made to vary the minutes, by reducing the costs to forty shillings, as the cause was heard upon bill and answer, which after some opposition on the ground of Lord Hardwicke's order of the 27th of April, 1748, (Beames's Orders, 450) was granted. (*Vesey*).

### LEGARD v. HODGES.

**B**Y indenture bearing date 13th of June, 1782, previous to the marriage of the defendants *Anthony Hodges* and *Anna Sophia* his wife, (late *Anna Sophia Aston*) and made between *Henry Aston*, esq. deceased, only son and heir at law and devisee named in the will of the honorable *Catherine Aston* deceased, of the first part; the defendant *Anna Sophia* (by her then name of *Anna Sophia Aston*) youngest daughter of the said *Henry Aston*, of the second part; the defendant *Anthony Hodges*, esq. of the third part; and the plaintiffs of the fourth part; reciting the intended marriage, and that *Henry Aston* had agreed to execute the power vested in him by the will of said *Catherine Aston*, and to charge certain manors with the sum of £4,000, as the portion of the said *Anna Sophia Aston*, it was agreed the said sum should be paid into the hands of the plaintiffs, and that the said *Anthony Hodges* should pay into the hands of plaintiffs the sum of £10,000, making together £14,000, as a fund for the jointure of the said *Anna Sophia*, and for portions for younger children of the marriage: the said *Henry Aston* charged his manors with the said sum of £4,000, and said *Anthony Hodges* covenanted, that in case the marriage took effect, "he would, after three years from the solemnization of the marriage, set apart and appropriate as a fund towards raising said £10,000, one third part of the clear yearly rents arising from his several estates in *Berks* and *Oxford*, and the several islands of *St. Christopher's* and *Montserrat*, and would yearly pay the same to the plaintiffs, or the survivor of them, his heirs or executors, until

S. C.

1 Ves. jun. 477.

A covenant to appropriate one-third of the produce of a real estate, to raise a sum of money, is not a mere personal covenant suable at law, but creates a lien upon the land, and the covenantees are entitled to have it specifically performed.

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til the said £10,000 should be paid, and in case of his death, leaving the said *Anna Sophia*, or any daughter or younger children of the marriage, then the heir, &c. of said *Anthony Hodges* should, within two years after his death, pay to plaintiffs, or the survivor, the said £10,000, or so much as should remain unpaid, with interest at £5 per cent. from the death of the said *Anthony Hodges*, upon the trusts of the settlement, and it was agreed that the plaintiffs should stand possessed of the said £4,000 and £10,000 in trust, to pay the dividends thereof to the said *Anthony Hodges* for life, and after his decease (among other things) to pay the said *Anna Sophia*, during her life, £500 a year, as her jointure, in bar of dower, and subject thereto, in trust for daughters or younger sons of said marriage, and in default of issue, in trust for *Anthony Hodges*, his executors, &c.

The marriage was solemnized about the 16th of *June*, 1782, but at the time of the bill filed there had been no issue.

By indenture of 7th *April*, 1784, made between the defendant *Anthony Hodges*, of the first part, and the defendants *Johnson* and *Turner*, of the other part; reciting the deed of settlement, and that defendant *Hodges* being considerably indebted, was desirous to go abroad, and had requested the trustees to take the management of his estates; said *Anthony Hodges* demised to *John* and *Turner*, all his estates in *Great Britain* and the *West Indies*, to hold the same for twenty-one years, in case the said *Anthony Hodges* should so long live, (subject to the mortgages thereon) in trust, to receive the rents, &c. of said estates, and to pay and apply the same for the year 1783, unto the said *Anthony Hodges*, or as he should appoint, afterwards in paying their own costs, and in the next place to pay said *Anthony Hodges* £1,000 a year, and the residue in the payment of the debts of the said *Anthony Hodges*.

*Johnson* and *Turner* entered into possession, under this deed.

Afterwards differences arising between Mr. and Mrs. *Hodges*, they agreed to live separate; and thereupon, by articles of separation, dated 8th of *August*, 1785, and made between *Anthony Hodges* of the first part, *Anna Sophia Hodges*, of the second part, the plaintiffs of the third part; *Johnson* and *Turner*, of the fourth part; and plaintiff *Henry Hervey Aston*, brother of the said *Anna Sophia Hodges*, of the fifth part; reciting the settlement of 16th of *June*, 1782, and the said indenture of 7th of *April*, 1784: It was witnessed and agreed between the said *Anthony Hodges* and *Anna Sophia* his wife, that they should live separate, and that said *Anthony Hodges* should yearly, for the space of three years next ensuing, in case they should both so long live, pay to the plaintiff *Henry Hervey Aston*, his executors, &c. the yearly sum of £500, and after the said three years, the yearly sum of £600 in trust, for the sole use of the said *Anna Sophia Hodges*, for her maintenance; and for securing the same, the said *Anthony Hodges* assigned to the said *Henry Hervey Aston*, his executors, &c. all the dividends  
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and interest of the said sum of £4,000, and such part of the said £1,000 *per annum*, allowed to the said *Anthony Hodges*, by the said indenture of 7th *April*, 1784, as would be sufficient, with the dividends of the said £4,000, to answer the respective sums of £500 and £600, as they should become due.

*Hodges* and his wife have ever since lived separate.

Plaintiff, *Henry Hervey Aston*, only son and heir of *Henry Aston*, the settler, paid the sum of £4,000 to the trustees, who laid the same out in the purchase of £5,451. 8s. 10d. 3 *per cent. consol. annuities*, and the plaintiffs, by deed poll on the back of the settlement, declared the trusts thereof.

No part of the £10,000 covenanted in the said settlement to be paid by *Hodges* to the plaintiffs *Sir John Legard* and *Henry Hervey Aston*, the trustees in that settlement, being paid, they filed the present bill against *Hodges* and his wife, and *Johnson* and *Turner*, the trustees in the indenture of 7th of *April*, 1784, charging, that the produce of the estates ought to be accounted for to them, and one third part thereof applied for the purpose of raising the said £10,000, and praying an account of rents and profits received from the estates, and of receipts and payments made by defendants, *Hodges*, *Johnson*, and *Turner*, and that a full third part since the 15th of *June*, 1785, may be paid to the plaintiffs on the trusts of the settlement, and a third part of the future rents, profits, &c. may be paid to them for the same purposes, until the £10,000 shall be paid according to the covenant of the defendant *Hodges*, and that the said covenant may be specifically performed, and that a receiver may be appointed of the real estates in *England*, and a consignee of the produce of the plantations in the *West Indies*.

To this bill, the defendants put in answers, by which they admitted the facts stated in the bill, and notice of the settlement; but the defendant *Johnson* said that the plaintiffs had notice of the trust deed, and farther said, that the £1,000 a year had been paid to the defendant *Anthony Hodges*; and he and *Turner* stated, that *Johnson* had paid several mortgages and other debts, and was entitled to stand in the place of the mortgagees, and is a creditor of the defendant *Anthony Hodges* in £2,750. *Johnson* further insisted, that he was not bound to appropriate the third part of the produce of the estates to the payment of the £10,000 till the plaintiffs made application to him, which they had not done, and that they having induced him to pay the debts, he is not liable to account for the same, and denied having in his custody any money arising from the plantations, and says he is in advance on account of the fund.

The defendant *Anne Sophia Hodges* disclaimed any interest in the £1,000, further than she was entitled under the settlement and articles of separation.

It was argued the 30th of *April* and 8th of *May*.

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Mr. *Mansfield*, Mr. *Hardinge*, and Mr. *Alexander* for the defendants, argued—that the trustees in the indenture of 7th April, 1784, are not liable to account for any thing, no demand having been made by the plaintiffs, as trustees in the settlement, till the filing of the bill; that the plaintiffs are not entitled to a specific performance. The covenant is merely a personal covenant by *Hodges*, to appropriate the third part of the produce to the payment of the £10,000. An action would lie for the breach of it, and in such action damages to the amount of the third part might be recovered: but the estate itself is not bound by the covenant; there is no lien upon the estate itself. There is no case precisely like this: but that of *Collins v. Plummer*, 1 P.W. 104, applies to the principle of this; there the tenant in tail covenanted not to suffer a recovery; he did suffer one, and the covenant was held to bind the personal assets, but not to affect the land. The parties in this settlement knew the covenantor might break his covenant. It is a covenant to set aside so much of the produce, but it is *Hodges* who is to appropriate, and before he can do so, the produce must come into his possession, it cannot be stopped before it comes to his hands, he must receive the rents, he must divide the funds. In cases where persons covenanting to pay, have been decreed to stand seised to the use of the covenantee, the management has not been reserved as in this case to the covenantors. At most, the trustees under the deed cannot be liable till they had notice from the plaintiffs, who have stood by and saw Mr. *Johnson* paying the debts, without calling upon him to appropriate the third part of the property to the uses of the settlement.

Mr. *Solicitor-General* and Mr. *Stanley*, for the plaintiffs.—If the covenant does not give a lien upon the land itself, it is only a personal covenant, and the trustees in the settlement can only bring an action at law, and can here only have a bill of discovery in aid of that action: in this case, they must bring an annual bill for an account, in order to bring an annual action for the sum discovered; but we insist they are entitled to a specific execution of this trust. The principle of the case of *Collins v. Plummer*, would put an end to all cases of lien; but the Court has said over and over, that covenants like these constitute specific liens, and that parties are not bound to bring actions on the covenant. Notwithstanding what is said in *Lord Warrington v. Langham*, Pre. Ch. 89, the Court in *Flight v. Cooke*, 2 Ves. 619, corrected the doctrine before laid down; where there is a covenant not to pay money, but to set aside a part of the produce, the party may claim a specific performance. It is within the case of a covenant to pay the profits: the trustees have a right to come into equity, for an account to have the profits applied according to the covenant, *Bosvil v. Brander*, 1 P.W. 458. Assignments of *choses in action* are supported upon the

the ground, that they amount to covenants to assign: here it is a covenant, that the assignor will not receive the money, or will hold it as a trustee. The doctrine of lien has been of late years much extended; in *Sowden v. Sowden*, (ante, vol. i. p. 582.) where *Sowden* by marriage settlement, covenanted to pay a sum of money to trustees, to be laid out in land to be settled to uses, he did not pay the money but purchased a freehold estate, the daughter who would have been entitled to the estate purchased by the trustees, if any had been so purchased, was decreed to have a real lien on the estate purchased by the father. *Bosvil v. Brander* was decided on another point, but the wife was held to a specific lien upon the note. The only difference between that case and this is, that here it is a third part of the produce, there it was a specific sum. So whilst seamen's wages were assignable, if *A.* a seaman indebted to *B.* assigned his wages, a bill by the assignee would be allowed. In this case it is in the form of a covenant, not of an assignment; but wherever the thing bound is certain, there may be a specific performance. Here the parties did not rely on the general covenant of *Hodges*, but took a special covenant to appropriate one third part: it is impossible therefore for him to put himself in such a situation as shall disable him from performing the contract. In *Durnford v. Lane*, (ante, vol. i. p. 106.) the principle of the determination was, that although the wife might not be bound, yet the husband having entered into a covenant, it was against conscience for him, by making the mortgage, to put himself into a situation in which he could not perform his covenant: therefore he could not give a title to mortgagees. Here *Hodges* has covenanted to set aside one third of the produce for a particular purpose, he therefore covenanted to keep himself in a situation to do so. A covenant to set aside a certain part for a particular purpose, does not give a remedy against the general property, but is a lien on the specific property.

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Mr. Mansfield, in reply.—The doctrine maintained is, that any thing amounting to an agreement to assign, will be equivalent to an actual assignment. The question is, whether *Hodges* has made himself a trustee as to these rents and profits; if so, at the end of three years, the plaintiffs might file their bill and pray a receiver, or that *Hodges* might be declared to be a trustee for them. It is impossible to construe this covenant in that manner; the fair construction is, that after the end of three years, *Hodges* should pay the £10,000 at a rate equal to the third part of the produce of the estate; on account of the fluctuating nature of the property, no specific annual sum could be ascertained, therefore this sum was taken that it should be the third part of the produce. Without violence to these words, the estate could not be taken out of the hands of *Hodges*; if it was, it became impossible for him to perform his contract. The only decree that can be made, is a dis-

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covery of the *quantum*, in order that the plaintiffs may sue at law. With respect to the cases cited on the other side, *Sowden v. Sowden*, is only that the father, by laying out money in purchasing a freehold estate, intended to perform his covenant, as much as if he had expressly laid it out in performance. *Bosvil v. Brander* does not apply to the present case. *Flight v. Cooke* is not intelligible, it only shews that the Court will secure a contingent interest. So in the case of seameus wages, that is applicable to a conveyance of any thing assignable. In all the cases there is an agreement to assign, which is equivalent to an assignment; but here is nothing in this case equivalent to an agreement to assign. *Durnford v. Lane* has no application to the present case. The only question was, whether the wife was bound by the covenant your Lordship held, whether she was bound or not, the husband was bound.

The only remedy here, is a personal remedy against *Hodges*. At all events, the account cannot go against the trustees, further back than the time when the plaintiffs called upon them to appropriate.

On the 13th of *May*, Lord Chancellor pronounced judgment to the following effect:

This bill was filed by the trustees in the marriage settlement, praying an account, and that they may be declared entitled, as trustees, to a third part of the produce of the estate of the defendant *Anthony Hodges*.

In order to raise the sum of £10,000 to be added to £4,000, the wife's portion, the defendant *Hodges* covenanted, that he would appropriate one third of the produce of estates in this kingdom, and in the *West Indies*. He afterwards conveyed his estates to other trustees, to raise £1,000 a year for himself, and with the residue of rents and profits to pay debts; that settlement takes notice of the former deed, so that all parties had notice of it, and the only question is, as to the operation of the first deed.

It is argued, on one side, that it is a mere personal covenant on the part of *Hodges*, upon which the plaintiffs might bring an action against him, but that it did not create any trust of the estate; and for this they cited a case from *Peere Williams*, where the party covenanted not to suffer a recovery, the consequence of which would be, that the estate, of which he was tenant in tail, would descend to his issue: it was argued, that it was a mere personal covenant; and it was held, in that case, to be so. That case gave countenance to the argument, that in this case it was a mere personal covenant. It was impossible, in that case to make the doctrine apply, that where parties come to an agreement relative to any subject, the subject itself is bound by the agreement; but I take the doctrine to be true, that where parties come to an agreement as to the produce of land, that the land itself will be affected by the agreement.



agreement. In that case, the effect of the agreement was to restore the estate tail, and the consequence would be to leave the party the whole power which he had before. There in form it was a personal covenant, and it was held it could not be corrected by the intent; there were not *termini habiles* for that purpose.

But except that case, there are none to derogate from the generality of the doctrine, that where a man makes an agreement relative to any subject, it will bind the subject itself.

In this case it is merely a trust estate as to one-third.

In *Broughton v. Langley*, (2 Salk. 679.) it was held, that though the estate was to remain in the covenantor, there was a trust for the benefit of the covenantee.

The plaintiffs therefore must be declared trustees as to one-third of this estate (a).

(a) This decree was affirmed by Lord Rosslyn upon a re-hearing, post, vol. iv. 421, where see the Editor's note. Vide also *Hale v. Elliot*, cited Sugden on Powers, 355. 1 Ch. Ca. 28. 1 Vern. 206. *Finch v. Earl of Winchelsea*, 1 P. W. 282. *Freemoult v. Dedire*, ib. 429. *Corentry v. Corentry*,

reported at the end of *Fearne's Maxims*. *Williams v. Lucas*, 1 P. W. 430, n. 2 Cox, 160. *Shannon v. Brudstreet*, 1 Sch. & Lef. 63. *Blake v. Marnell*, 2 Ba. & Bea. 44. Affirmed 4 Dow. P. C. 248. Mr. Fonblanque's note, vol. i. 367, and the Editor's note to *Jackson v. Jackson*, post, vol. iv. 467.

(a) *PIGOTT v. BULLOCK.*

**JOHN PIGOTT**, Esq. being seised of real estate at *Dodder-shall*, in the county of *Bucks*, by will devised the same to *Christobella* his wife for life, "with full liberty to cut timber and underwood for repairs, or for her own use in fuel or otherwise; but not to sell the same;" remainder to the plaintiff for life; remainder to his children in tail. The testator died in 1751; *Christobella* the widow entered upon the estate, and took the profits of the same. She afterwards, in 1754, married *Richard*, the late Lord Viscount *Say and Sele*, who died in 1781. Between the death of the testator and her second marriage, during the second coverture, and after the death of Lord *Say and Sele*, she (with her husband Lord *Say and Sele*, during the coverture) cut large quantities of underwood, more than was necessary for repairs, or her own use, and sold the same to a considerable amount; she died in 1789, having made the defendants her executors. The plaintiffs filed the present bill, for an account of underwood cut between the death of the testator and the second marriage; and from the death of Lord *Say and Sele*, to that of his widow; admitting that his remedy for that cut during the second coverture, was against the assets of Lord *Say and Sele*, in the hands of his executors.

(a) Reg. Lib. B. 1791, fol. 231.

Mr.

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1 Ves. jun. 679.

Mr. J. Buller,  
for Lord Chan.

Testator devised his estate to his wife for life, "with liberty to cut timber and underwood for her own use, but not to sell;" she cut underwood and sold it, and died: her estate is not accountable for the money produced; at least not to the next taker for life, impeachable for waste.

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Mr. *Lloyd* and Mr. *Alexander*, for the plaintiff, said—It was understood, that it would be argued on the other side, that this restriction was void; but they did not see how that argument could be supported; as the giver of any benefit might prescribe conditions or restrictions to his gift. That it is true where the restriction is inconsistent with the gift, as a gift in tail, with condition not to suffer the recovery, it is void; but here the restriction is consistent with the gift, and is good. Then the first question will be, who is entitled to the value of the timber and underwood which has been cut; whether the plaintiff, as the next tenant for life, or the next owner of the inheritance. If the latter, that is the plaintiff's son, and it must stand over to make him a plaintiff. The plaintiff, as being the next taker for life, would be entitled to the underwood if now standing, and would be entitled to cut it and put the money into his pocket; therefore, as the injury is done to him, he is entitled to the account. There was no intention on the part of the testator, to make this underwood part of the inheritance. No restriction was laid upon the first taker for life; therefore he could do every thing, which a tenant for life impeachable for waste, could do; and of course, could cut and fell the underwood. It is true, that in *Whitfield v. Bewit*, 2 P. W. 240. (3 P. W. 267.) it was held, that the timber fallen by wrong, or accident, belongs to the first owner of the inheritance; and that it has been held in *Garth v. Cotton*, 3 Atk. 751, that the tenant for life, and tenant in tail in remainder, cannot cut timber by collusion, before the tenant in tail comes in possession; and that in such cases, the Court will take the money, and lay it out, till it sees who will ultimately be entitled to the inheritance; and that in the case of *Williams v. The Duke of Bolton*, (Mr. Cox's note on 3 P. W. 268.) the Court did the same thing, where the tenant for life, having the next inheritance in himself, cut timber; it will not do so, where the next tenant for life would himself have a right to cut the timber, and put the money in his pocket, as the plaintiff might do in this case. Here the underwood is wrongfully cut down, and *Lady Say and Sele* was answerable to somebody for the money. In *Garth v. Cotton*, the trustees would have had the right of action. Here the right to the money is in the plaintiff; suppose a bill had been brought by the heir, the money must have been brought into Court, and if he survived *Lady Say and Sele*, the money must have been paid to him. There is no case in the books exactly like this; the nearest is in 2 Croke, 688 (a). Here the injury being done to the plaintiff, he must have the remedy.

Mr. *Solicitor-General*, Mr. *Mitford*, and Mr. *Hollist*, for the defendants.—The bill seeks for an account of underwood cut down at two different periods. With respect to the former period, it is a sufficient answer, that it is for an account of underwood cut

(a) *Giles Bray v. Sir Paul Tracey*.

thirty-

thirty-eight years ago ; and though the statute of limitations is not pleaded, a court of equity will not give an account upon a stale demand. If she had possessed an estate by wrong, the remedy by ejectment would have been nearly doubly barred. With respect to the latter period, the question is, whether *Lady Say and Sele* was so restrained from cutting the underwood, that if she did cut it down, the property in it would be in any other person ; and if so, whether there is any pretence for asserting, that the property was in the present plaintiff, as the next person entitled to an estate for life.

The persons interested in contending against *Lady Say and Sele*'s right, ought to be before the Court—But without contending on the want of parties: This is not a reservation ; if it was a reservation of the timber and underwood, the property of the timber and underwood would be in the person for whom reserved, or the owner of the inheritance. It is not a condition ; if it was a condition, it would be void, as being repugnant to the gift ; and a gift cannot be qualified by a condition repugnant to it. Co. Litt. 206 b. There might as well be a condition not to cut grass for sale, as such a condition as the present ; it would be to restrain a fruit of the tenancy for life. Neither can it be a condition ; because nobody can take advantage of a condition but the heir, and here the heir, on taking, would avoid all the limitations. Neither is it a condition, for the want of a gift over ; a condition of which no one is to take the benefit, is of itself void. Here it could not be the property of the plaintiff ; a tenant for life, impeachable for waste, has no property in the timber. Even a tenant for life unimpeachable, has no property in the timber. *Lewis Bowles's* case, shews that the clause “ without impeachment of waste,” gives him no property ; it only gives him the privilege of cutting it ; but if he does not cut it, it goes over with the estate. If the present plaintiff had a title, when did it accrue ? At the time of cutting he had none ; she was at liberty to cut. No claim could arise till the sale. Where timber is cut by wrong, trover will lie for it ; the first tenant of the inheritance may bring trover, though he cannot bring waste, where there is an intervening estate. But here was a gift to the wife for life, and therefore it was a gift to her of the profits of the estate for life, and the underwood is one of the profits ; which, if not given to somebody else, is given to the tenant for life. I admit the case of the gift of a house, with the exception of a room ; but this is more like the gift of a house, with the exception of the right of sleeping in the second floor of it. It is a fruitless denotation of the testator's intention, and no claim of forfeiture or gift over. This is not like the case of *Williams v. The Duke of Bolton*, or any of those where the Court will take the money. It is a mere ineffectual restraint : and the underwood being cut before the plaintiff's title commenced, he can have no right to recover. In all cases where there is no gift over, the restraint is fruitless ; as in the case of a legacy with a condition that the party shall not marry, or shall not marry a particular person : without a gift over, the restraint is void. So

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So of a lease declaring that the lessee shall not assign, it will have no effect, without a provision of forfeiture, thought it is a case of contract.

Mr. *Lloyd*, in reply.—With respect to the first period, if we are right, the cutting the underwood was a fraud in *Lady Say and Sele*, and consequently, the statute of limitations is out of the case; and although the action at law for the tort is gone by her death, a court of equity will give a remedy against her personal assets. 3 Atk. 757. *Garth v. Cotton*. Then it is argued, that the present plaintiff is not the person entitled to the remedy, or that he has forfeited it by not coming sooner. With respect to the latter objection, it is not necessary that a person entitled to the benefit of a forfeiture, should claim it immediately; it is sufficient for him to do so when he comes into possession. He did not come into possession till the death of *Lady Say and Sele*, in 1789; and in the year 1790 he filed the present bill. With respect to the restriction, I admit that a restriction repugnant to the gift is void; but in this case there is nothing repugnant. There is no case to prove that a testator may not give an estate, or any other thing with a restriction of the use of it. In the case of the *Chapter Coffee-house*, (*Sloman v. Walter*, ante, vol. i. p. 418.) where the house was let with a reservation of a room; no body doubted that the reservation was a good one. Here the reservation is, that she shall not cut for sale; had it been, that she should not cut at all, there is no doubt that would have been good. There is not a doubt that the testator might restrain cutting for botes, although they are incident to the life estate, if not excepted; they may be severed from it. So a reservation not to cut underwood in a particular close, or not to plow up a particular field, would be valid. There is nothing clearer, than that the intention of the testator was that his widow should not cut either timber or underwood for sale. If she had threatened to cut underwood, the Court would have granted an injunction to restrain her. Suppose a man in his will, first to give an estate without impeachment of waste, and then to say, I mean that he should not commit voluntary waste, the restriction would be good, and the party would be restricted to permissive waste. Nothing is said as to the consequence of cutting; the money produced by the underwood must be part of the estate.

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Mr. Justice *Buller*.—The first point is, whether there is any ground of distinction with respect to the different periods for which the account is sought. It is insisted, on the part of the defendants, that it is against conscience to call for the value of what was cut during the first period; but if she cut the underwood and sold it wrongfully, her estate has been increased by it, and therefore there is no reason why the account should not extend to that.

Upon the merits there are two questions. First, whether her representatives are accountable to any body: Secondly, whether they are accountable to the present plaintiff.

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The first question depends on the words of the will, by which she is at "full liberty to cut timber or underwood for repairs, or for her own use, for fuel or otherwise, but not to sell." It seems as if he meant not to restrain any power which she had as tenant for life, but to give her a further right. He meant she should have timber *for her own use*, which she would not be entitled to as bare tenant for life; and so far the clause is sensible; but the same reasoning does not hold with regard to the underwood, because, as to that she would have a right to it from the nature of her estate. He meant to enlarge, not to diminish her interest. There is no provision as to the consequence of her cutting, so that it amounts only to a recommendation to her not to cut for sale. I therefore conceive her estate not to be accountable to any body for the underwood cut and sold.

But the second question is perfectly clear, that if accountable at all, she is not so to the present plaintiff: he is not entitled. To say that the Court would have granted an injunction to restrain her from cutting, at his suit, is begging the question. Mr. Lloyd puts the case, that the testator had given an estate for life, *without impeachment of waste*, and had afterwards *excepted voluntary waste*; but that is not like this case, because giving the estate *without impeachment of waste*, was an addition to the estate for life, which might be restrained as to the extent of it. Here, the words added, do not increase the interest as to the underwood, but leave that as it was. The heir, in this case, never could have a right to recover for a breach of the condition; for all the interest is disposed of. Then the question is, whether the plaintiff, who is tenant for life without a power of committing waste, has a right to underwood cut before his estate commenced. The law is clear that a tenant for life without impeachment of waste, cannot maintain an action of trover for timber cut before his estate came into possession (a).

(a) So in *Pyne v. Dor*, 1 T. R. 55. (which is probably the case from the Home Circuit, alluded to in Mr. Vesey's report, though there is some inaccuracy, either in the recollection of the learned judge, or in the report of what he said) it was determined that trover could not be maintained by a tenant in tail expectant on the determination of an estate for life without impeachment of waste, for timber which grew upon and was severed from the estate. In *Blake v. Aynscombe*, 1 N. R. 25. where trustees under a settlement were tenants *pur autre vie*, this action was also held not maintainable. In the late case of *Williams v. Williams*, 15 Ves. 419. an interesting and difficult question arose upon this subject; lands of the husband had been settled upon himself for life, without impeachment of waste; remainder to the wife for life for her jointure; remainder to

the issue of the marriage in strict settlement; remainder to the heirs of the body of husband and wife; there being no issue, the question was, whether the wife, who survived, was entitled to cut timber, and to the property of it when severed. Lord Eldon then stated the distinction between that case, and those where tenant in tail after possibility of issue extinct, had been held to be unimpeachable of waste: those cases having been determined on the inheritance *having once been* in such tenant, which was not the case under the present settlement. The Court of King's Bench, however afterwards, upon a case directed, certified that she was tenant in tail after possibility of issue extinct; 2dly, that she was unimpeachable of waste; and 3dly, entitled to the property of the timber when severed, 12 East, 209.

Then

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Then how will it be as to underwood, during the life of a tenant for life impeachable for waste? The tenant for life has a right to cut underwood; but if he leaves it uncut, it goes with the inheritances. Here the plaintiff had no interest in the timber or underwood during the life of *Lady Say and Sele*. If there is any title to the account, it must be in the owner of the inheritance.

*Bill dismissed with costs.*

S. C.  
 1 Ves. jun. 484.  
*Anon.*  
 Practice, Plea.

## DANIEL v. MITCHELL.

**T**O this bill, the defendant pleaded a former suit depending for the same matter: Before the plea was set down to be argued, Mr. *Steele* moved, on the part of the plaintiff, that it might be referred to one of the Masters of the Court, to look into the bill, and into the defendant's plea, and the bill in the said plea mentioned to have been exhibited by the plaintiff against the defendant, and the proceedings therein, and to certify whether the said bill formerly exhibited, is for the same matters as the complainant's bill in this cause, and whether the same is now depending; and he cited in support of his motion, 1 Vern. 332.

*Lord Chancellor* at first thought the plea ought to have been set down, but Mr. *Steele* observing, that setting the plea down would have been an admission that the former bill was for the same matter; his Lordship

*Granted the motion (a).*

(a) Vide *Wall v. Hobson*, 2 Vet. & Bea. 110. Mitf. Tr. 196. Coop. Tr. 272. Beames's Elements, 158.



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## ASTLEY v. The Earl of TANKERVILLE.

tween FRANCIS DUGDALE ASTLEY, Esq. and  
JOHN FLETCHER, Clerk, JOHN BRIDGEWOOD,  
Gent. (surviving Executors of the late Sir JOHN  
ASTLEY, Bart. deceased) and JOHN CARR, Esq. } Plaintiffs.

ie Right Honorable CHARLES Earl of TANKER-  
VILLE, and CHARLES AUGUSTUS BENNETT, } Defendants.  
commonly called Lord OSSULSTON, -

BY indenture tripartite, dated 23d of October, 1716, Sir John Astley, for himself and Lady Astley, covenanted with trustees levy a fine (which was afterwards levied) and to settle estates in Abbey Foregates, Longdon, &c. (which were estates held in right of Lady Astley) to the use of Sir John for life, remainder to trustees preserve, &c.; remainder as to part, to Lady Astley for life; remainder as to other part, to trustees for a term, to pay Lady Astley annuity; remainder to trustees for a term, to raise portions for younger children; remainder to first and other sons with other immediate remainders); remainder to Sir John and Lady Astley fee, with a power to Sir John and Lady Astley to revoke the assent and limit new uses. On the 23d of June, 1725, Sir John and Lady Astley joined in a conveyance, by way of mortgage for 10 years, of the premises, to Holden for £3,000, with proviso of redemption, on payment by Sir John Astley, his heirs, executors, administrators, or such other persons to whom the freehold and inheritance of said premises should belong. On the 24th of September, 1734, the mortgage was paid off, and the term assigned by Holden to Cotes in trust, for such uses as Sir John Astley should by deed appoint, and for want of such appointment, to attend the inheritance. (Lady Astley was not a party to this deed.) On the 11th of May, 1747, Sir John Astley borrowed of Messrs. Hoare and Co. £3,000 on this estate, and Cotes, by his appointment, assigned the term to them as a security, and Sir John Astley covenanted to pay the money.

In 1758, Sir John and Lady Astley having several children (and among them Alicia Countess of Tankerville, mother of the defendant) they by indenture 4th of June, revoked the uses of the former settlement, and limited the estates, after the death of Sir John Astley, to Lady Astley for life, remainder to Richard Philip Astley their eldest son, for life, remainder to trustees to preserve,

11th May, 1784.  
24th May, 1792.

Husband and wife levy a fine of the wife's estate, and settle the same with a power to them to revoke, and declare new uses: They afterwards join in a mortgage term, to secure a sum redeemable on payment by the husband, or the persons to whom the freehold should belong: The mortgage was paid off, and the term assigned to a trustee, to such uses as the husband should appoint: He afterwards [546] (without the wife) borrows a further sum, and makes the term a security, and the trustee joins in the assignment: The husband by will, orders his personal estate to be applied in payment of debts, except those secured

upon mortgaged estates: This is the husband's debt, and shall be paid by his personal estate, not by the mortgage term.

Devise of copyhold subject to a mortgage, not sufficient to exonerate the personal estate from the payment of the mortgage money.

&c.;

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&c.; remainder to his first and other sons; remainder to secure to *Alicia* Countess of *Tankerville*, a sum of £500 a year; remainder to defendant, the Earl of *Tankerville*, for life; remainder to his first and other sons; remainder to the second and other sons of Lady *Tankerville*; remainder to Sir *John* and Lady *Astley* in fee.

Sir *John Astley* afterwards bought in several copyhold estates, held of the manor of *Longdon*, of which he was lord, which were surrendered to him, and afterwards conveyed them to *Edward Lloyd*, as a security for £1,000 borrowed of him.

*Richard Philip Astley* and Lady *Astley* both died in the lifetime of Sir *John Astley*. The £3,000 continued unpaid to Messrs. *Hoare*. Sir *John Astley*, the 18th of May, 1781, made his will, and therein ordered, that his personal estate not otherwise disposed of, should be applied in payment of his funeral expences, debt, and legacies, except such debts as were secured upon, and might affect any of his estates in *Abbey Foregates*, *Longdon*, &c. whereof he was not seised in fee-simple, (meaning the estate in mortgage to *Hoare*) and devised the copyhold estate he had purchased in, subject to a mortgage for £1,000 and interest for the same, to *Edward Lloyd*, to defendant the Earl of *Tankerville* in fee, and gave the residue of his personal estate to his executors, to be laid out in the purchase of lands for the benefit of the plaintiff *Astley* and his issue male.

The executors, after the death of Sir *John Astley*, paid off the mortgages to *Hoare* and *Lloyd*, and took assignments to *Carr*, as a trustee for them.

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Sir *John Astley* dying without issue male, Lord *Tankerville*, under the limitations in the settlement of 1753, took possession of the estates settled thereby, and also of the copyholds as devised under Sir *John Astley*'s will.

Plaintiff *Astley* brought ejectments on the demise of *Carr*, in order to get possession of the premises contained in the 500 years term, and of the copyhold estates. The cause came on to be tried before Mr. Justice *Buller*, at the Summer Assizes, 1780, for the county of *Salop*, when the judge was of opinion, that Sir *John Astley* had no right to charge the freehold estate with the £3,000, and therefore it ought to be paid out of his personal estate, and being also of opinion that plaintiff *Carr* had no legal title to the copyhold, he was nonsuited.

And the plaintiffs filed this bill, insisting that the testator had manifested his intention that the £3,000, should not be paid out of his personal estate, but remain a charge upon the freehold lands; and that he had devised the copyhold to defendant Lord *Tankerville*, subject to the mortgage of £1,000, and therefore that having paid the mortgages, they ought to be repaid by Lord *Tankerville*, or to have a satisfaction out of the copyhold; and prayed that he might elect, either to pay the said two sums of £3,000 and £1,000, or give up the copyhold premises.

Lord

Lord *Tankerville*, by his answer, insisted that Sir *John Astley* being seised only in right of Lady *Astley*, had no power to charge the freehold with the £3,000 borrowed of *Hoare*, without Lady *Astley* joined in the deed, and therefore the estate ought not to be charged with the same under the will, and that the testator did not mean to make the copyholds liable to the debt to *Lloyd* and therefore submitted, that if plaintiff *Astley* had paid off the same he ought not to be reimbursed.

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The cause came on to be heard 11th *May*, 1784.

Mr. *Mansfield*, for the plaintiffs, contended—that Sir *John Astley* had a right to charge this freehold estate; and having by his will made it liable for the mortgage money, his personal estate was thereby exonerated. The estate was not Lady *Astley*'s, he was more owner of the estate than she was. He was tenant for life unimpeachable for waste, and as such might cut timber, and under the power he could mortgage the estate. By the will he has charged the *Longdon* estate; otherwise, the exception means nothing. With respect to the copyholds, they were given *subject to the mortgages*, and therefore ought to be charged with them, and not paid out of Sir *John Astley*'s personal estate.

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Mr. *Scott* and Mr. *Partridge*, for the defendant Lord *Tankerville*; and Mr. *Attorney-General (Arden)* for Lord *Ossulston*.—The intention of Sir *John Astley* in the will was, to charge the settled estate with the mortgage money; but that he could not do. Where a husband and wife levy a fine of the wife's estate, and raise money for the use of the husband, though the estate is a pledge for the debt, yet the husband's personal estate is liable, and the estate pledged is no further liable than as such. Lord *Huntingdon's* case, 2 Vern. 437. 1 Bro. P. C. 1. *Tate v. Austen*, 1 P. W. 264. *Bagot v. Oughton*, ib. 347. Here, by the payment of the original mortgage, the charge was at an end, and the assignment to *Cotes* was in trust to attend the inheritance. The term was then completely at an end, and in order to revive it, Lady *Astley* must join in the instrument. Thirteen years after, Sir *John Astley*, without the intervention of Lady *Astley*, borrows £3,000 of the *Hoares*, upon the security of this estate, and the trustee joins in the conveyance; but this assignment was not a good execution of the power. Then the personal estate must pay it as his personal debt.

With regard to the copyholds, they contended that the words *subject to a mortgage*, would not prevent them from being exonerated by the personal estate; such words do not shew that the devisee is to be liable to pay the mortgage money. *Serle v. St. Eloy*; 2 P. W. 386. There is no pretence for the plaintiff *Astley*, who is to take so large an interest in the lands to be purchased, to  
insist

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insist that the copyhold should bear the £3,000 charge, and that he should bear no share in respect of the estates devised to him.

*Lord Chancellor*, during the argument, seemed strongly of opinion, that notwithstanding *Lady Astley* joined in the mortgage, the debt continued to be the debt of *Sir John Astley*, but ordered the cause to stand for judgment, which it did till 24th *May*, 1792, just previous to his Lordship's resignation; when he ordered the bail to be

*Dismissed without costs (a).*

(a) Vide Mr. Cox's note to *Tate v. Austin*, cit. sup. and the Editor's note to *Clinton v. Hooper*, ante, 201.

In Court, Hill.  
1785.

Lincoln's-Inn  
Hall, 1st, 4th  
Feb. 1785.

24th May, 1792.

Tenant for life,  
with liberty to  
cut timber at  
seasonable times,  
is not to cut  
trees planted for  
ornament or  
shelter to the  
mansion-house,  
or saplin trees  
not fit to be cut  
or felled for tim-  
ber.

### CHAMBERLYNE v. DUMMER.

**THOMAS DUMMER**, esq. made his will, and thereby (among other things) devised his real estates situate at *Cranbury*, *Woolston*, and *Baddesly*, in the county of *Southampton*, to the defendant, his wife *Harriot Dummer* for life, and in case of her death to *Elizabeth Holland* for life, remainder to the plaintiff *William Chamberlyne* in fee.

The testator, just before his death, made two codicils to his will, the words of the first codicil were, "It is my request, that my dear wife should keep up and occupy my several mansion-houses, &c. in the county of *Southampton*, in such manner as we have hitherto done:" the words of the second codicil, dated 12th of *February*, 1781, and which was the most material to the present suit, were these—"Whereas I have devised my estates, by my last will and testament as therein mentioned, and my dear wife *Harriot Dummer* has no power to cut down any timber; now I give unto my said wife, for and during so long time as she shall continue my widow, full power and authority to cut timber upon any part of my estate, for her own use and benefit, at all seasonable times in the year, any thing in my said will notwithstanding."

Mr. *Dummer* died in *June* following, 1781, seized of the said estates devised as aforesaid, to the amount of £5,000 per annum and upwards; he had in the county of *Southampton* three several mansion-houses, and upon the estate where he chiefly resided called *Cranbury*, there were several large plantations of trees about the house, in pleasure gardens and lawns, consisting of 200 acres: he had another mansion called *Woolston*, a less house than *Cranbury*, (in which he occasionally resided) about which were some small plantations. And a third house called *Baddesly*, which he rarely or never inhabited himself, the testator having lent it to the plaintiff *Chamberlyne*; it was burnt down, but afterwards rebuilt upon a less plan, and about this house were some small plantations of elms, &c.

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The

The plaintiff filed the present bill against Mrs. *Dummer*, charging that she had cut down a great many trees which had been planted for shelter and ornament to the mansion-houses, and which stood in the lawns, gardens, and pleasure grounds belonging to the testator, and also great numbers of saplings and timber trees unfit to be cut, and praying an account of such timber so cut, and satisfaction for the same, and an injunction to restrain the defendant from committing waste and destruction upon the estates.

Soon after the filing of the bill, the plaintiff moved for an injunction: the proceedings on that application are reported, vol. i. p. 166.

The defendant Mrs. *Dummer* had since married — *Dance*, Esq. who had been properly brought before the Court.

The cause came on to be heard in *Hilary* Term 1785.

Mr. *Mansfield*, on the part of the plaintiff, insisted—that the power given by the codicil, was not an absolute power, much less expressed in such general terms as *without impeachment of waste*, but that it was a *limited* power, so long as she should remain his widow, to cut timber for her use and benefit, and upon this power her right was founded.

That Mrs. *Dummer*, under this power, in the summer after the testator's death, as the evidence shews, sent for her surveyor, and directed him to mark timber for cutting, so low as four feet cubit of timber, to the amount of £12,000, she ordered timber to be cut round the mansion-house at *Cranbury*, except such trees as were close to the house. That Mrs. *Dummer*, according to the evidence, understood this to be a full and absolute power to cut down every tree, except what was close to the house; and that, pursuant to her orders, trees, not merely timber trees, but those standing in avenues, walks, pleasure grounds, gardens, and lawns, have been cut down to the amount of £11,000, and some of which were young oaks, not worth more than 3s. *per tree*, and much more would have been cut had she not been restrained by the injunction of this Court. Mrs. *Dummer* derives no such power under this will, and the decree in this case should be similar to that in *Aston v. Aston*, 1 Ves. 264, for satisfaction for those trees which ought not to have been felled, and had been so in an unreasonable and unhusband-like manner; that was a case stronger than the present, because the party was tenant for life without impeachment of waste.

In order to support Mrs. *Dummer's* right, it must be contended, that this power, during her widowhood, meant no limitation, but that if she remained a widow for six months, she might have stripped the estate: but it is only a power of cutting in a reasonable way, timber which is fit to be cut.

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*Lord Chancellor*.—The question ought to be, whether the tenant for life has cut down timber which a tenant in fee would have thought it unreasonable to do; so as to shew that the timber has been cut down in an unhusband-like manner, as in *Aston v. Aston*; therefore I must hear the evidence for that purpose.

*Mr. Mansfield*.—There is another case material to be stated. *Lord Castlemain v. Craven*, 2 Eq. Abr. 758, (also 22 Vin. 523.) the decree there was, that Lord *Craven* should account to the plaintiff as tenant in tail.

*Mr. Scott*, on the same side.—The interest Mrs. *Dummer* had under the will and codicil, does not amount to the same interest as tenant for life without impeachment of waste (since *Lewis Bowles's* case, 11 Coke's Rep.). His first codicil, containing a special direction that she should keep up and occupy the houses in the same manner as the testator had done; a testator leaving such a direction, could not mean she should strip the house of such trees as were for *shelter or ornament*; which he intended she should keep up, as he had done in his life-time: he has not made her absolute tenant for life without impeachment of waste, for he has used these words, "at all seasonable times in the year." Supposing the testator to have omitted "at seasonable times," could Mrs. *Dummer*, intending to marry within one week afterwards, cut down every piece of timber, as tenant for life without impeachment of waste could have done? Supposing her to be tenant for life without impeachment of waste, &c. she would not then have had the power to cut *unthriving timber*; though a person, having such an interest, might have cut what was thriving. The testator meant the reversioner should have a chance for those trees, and that his widow should only cut, at what the reversioner *might deem seasonable times*.

*Lord Chancellor*.—Do you mean, *by seasonable times of the year*, that particular period at which you might make the best advantage of the timber, or any thing more?

*Mr. Scott*.—That, and something more; for that expression must mean, not merely the cutting at a proper time, but the cutting it at such a time, in such quantities, and in such manner, as not to injure the *growing timber*. Mrs. *Dummer* must, according to the testator's intention, have had such a power as that in *Lord Castlemain v. Craven*: that was a power, with consent of trustees, to fell timber; it was as large a power as can be insisted on the part of Mrs. *Dummer*; and consequently the having such a right, and abusing that right, by injuring the estate, a court of equity will repair that injury, by an account of, and satisfaction for, the damnification, or  
some



some remedy in that form. This appears from the tenor of former decrees, and the terms in the orders in the old books; in which it appears, that the Court satisfied themselves with a great latitude, in framing such orders.

From Sir *H. Packington's* case, 3 Atk. 215, it appears, if a single tree is cut down in lawns, pleasure-grounds, or gardens, (which equity will protect, though the law does not) it is a sufficient ground for an enquiry before the Master, as to the value, &c. It is stated, that in that case, there were only three oaks cut: this appears otherwise by *the Register's book*) but in the present case, a large number has been cut down. An intention of waste appears *from the evidence*, and that many more would have been cut, had not the injunction of this Court prevented it. There must be another point of enquiry before the Master, as to what trees have been cut down which were for shelter or ornament. In the case of *Lord Cardigan v. The Duke of Montague*, before Lord Northington, it was held, that *supposing it to be an antique lawn*, yet the Court must protect the trees in the shape the testator left them though ever so contrary to the present taste; and notwithstanding it is proved in evidence, that the cutting or removing them is an improvement, yet such an act, in this Court, shall be considered as waste.

*Lord Chancellor.*—The reference to the Master should be confined merely to the *timber trees*; that must have been the utmost extent to which the Court has gone.

*Mr. Scott.*—The cases are material, and we must apply the principles of them to the present instance; that equity will give an account of the value of the timber trees, and a satisfaction for the damnification suffered upon the estate: if the plaintiff is entitled to a satisfaction, he must be so to have an account of the value of the trees cut down. In *Packington's* case, *lawns, avenues, and ridings* are mentioned.

*Lord Chancellor.*—I would not send a loose reference to the Master, it ought to be as precise as possible; I should wish to relieve the Master from the necessity of construing what is meant by *unhusband-like* manner.

*Mr. Scott.*—Suppose the enquiry was to be confined to what timber was *thriving* or *unthriving*, as in *Castlemain v. Craven*; in that case the Court held, that notwithstanding the consent of the trustees had been given, the party had no power to cut thriving timber, and directed an account, considering the reversioner entitled in equity, to the value which was to be paid accordingly; so that the principle must be this, that the tenant for life has a power to cut down *unthriving* timber, but in respect to what is

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*thriving*, the tenant for life shall not have the benefit before the reversioner: and it appears that, upon a direction to take an account of thriving timber, it is a fact sufficient to be ascertained by the Master, or a jury, as a matter competent for either to judge of.

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*Lord Chancellor.*—Suppose the trustees had consented, in *Castlemain v. Craven*, the question would have been, as such timber has been cut down by their consent, it is not a breach of trust to consent to the cutting of timber, which tends to the destruction of the estate, and not suffering the timber to grow to a proper maturity? There may be doubts as to which is *thriving and unthriving*, and that is a singular case, and by no means a guide as to the present instance. It is not sufficient to establish a rule; for the Master of the Rolls there, went not upon general principles, but upon the terms of the trust. As to the term *husband-like*, though I know its meaning when applied to *agriculture*, I confess I do not when applied to the felling of timber.

*Mr. Scott.*—If a charge is carried in to the Master, the plaintiff *must support it by evidence* of persons skilled in the knowledge of timber.

*Lord Chancellor.*—What is in law held timber, is what is deemed so by the custom of the country; which must appear from *evidence*. By *husband-like manner*, do you mean what part of the timber it would have been of advantage to the tenant in fee to cut down, meaning to make use of it in an useful manner? Supposing a tree of improper growth for building a house, is the cutting of that waste? If you take the word in that sense, its meaning must be construed according to the judgment of builders.

*Mr. Scott.*—The terms of the injunction granted by your Lordship are these, to restrain from cutting any *timber or trees*, which were planted for shelter or ornament to the houses; which were the terms used in *Obrien v. Obrien*.

*Mr. Hollist*, on the same side.—There is sufficient evidence to support a reference to the Master. There are two points, first, as to the cutting down trees about the houses, or which were planted in pleasure grounds, gardens, or lawns. Secondly, as to the general cutting timber off the estate. According to the former authorities, the Court is not to be guided by their judgment, in respect to what is ornamental or not, as to the taste of the times, but what was deemed and preserved as such by the ancestor; and which ought to be continued in the same style and situation as he left them: as in the old cases *Williams v. Day*, 2 Chan. Cas. 32, and *Vane v.*  
*Lord*

*Lord Barnard*, 2 Vern. 738, and the modern ones of *Obrien v. Obrien*, and *Cardigan v. Duke of Montague*. As to the question of cutting timber generally, Mrs. *Dummer* has misused her power, which is not so full a power as that of a tenant for life without impeachment for waste, being only during *widowhood*, and at seasonable times of the year; it was the testator's intention, that Mrs. *Dummer* should cut timber in a *fair manner*, as he himself would have done. With respect to a reference, the burthen lies upon the plaintiff; he must produce evidence sufficient to support the charge before the Master; and if he fails in that respect, the reference will be useless. In *Aston v. Aston*, an account was directed of all trees. The profits of the thriving timber ought to go to the plaintiff, as in *Garth v. Cotton*, 3 Atk. 751, and *Williams v. Duke of Bolton*, (*Cox's* note on 3 P. W. 268.) in the latter case, the Court would not suffer the Duke to profit by his own wrong, but ordered the money arising from the sale of such timber to be paid into the Court for the benefit of the remainder-man, if one should come *in esse*.

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Mr. *Attorney-General*, (*Arden*) for Mrs. *Dummer*.—The question is, what power Mrs. *Dummer* derived under her husband's codicil; the meaning of which, though it is inaccurately penned, is extremely clear. If she has not exercised that power, in any instance wrongfully, the bill should be dismissed with costs. By adding this codicil, the testator meant to prevent litigation, and this power is adequate to that of a tenant for life without impeachment of waste. The testator intended to give her a power of cutting timber, so long as she should continue a widow; which shews that he left the exercise of this power to her *discretion*, and that she should not be restrained till after a future *marriage*. It has been said by Lord *Hardwicke*, that when a testator leaves an estate to one tenant for life, with remainder over, his intention is to leave the thing he himself enjoyed, and all the benefits which the testator held with it, would of course belong to such person, from the nature of the thing itself; and therefore in *Aston v. Aston*, Lord *Hardwicke* made the distinction, and he has never used the word *saplings* as being unfit for timber. Notwithstanding what has been suggested on the other side, the Court have never gone so far as to restrain the party from cutting trees which were standing in lawns or pleasure-grounds, (at large;) but the injunction has been confined merely to those which served as shelter or ornament to the house; equity has never enjoined a tenant for life, without impeachment for waste, from exercising that power in the fullest extent, in respect to all trees that could be called timber, and has only prevented the party from doing what would destroy the thing devised, and hinder its being enjoyed as the testator intended it should be. It never was Mr. *Dummer's* intention that the plaintiff should have all the timber which at that time was growing to maturity: if he

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had so meant, the instructions given to Mr. *Chamberlyne*, for his codicil, and which were proved in the cause, would have been to that effect. In *Piers v. Piers*, 1 Ves. 521, Lord *Hardwicke* said the Court would not interfere, but in the case of *spoliation* or *destruction*: where things have been destroyed which were necessary for the enjoyment or the existence of the thing devised, the Court has interposed, as in Lord *Barnard's* case. The party shall not use that power wantonly or maliciously without benefit to himself, or with benefit, if it tends to the destruction of the *thing itself*. As to *Packington's* case, Lord *Hardwicke* left out that part of the order which mentioned trees of an improper growth, because of disputes: the law would not permit him to make such order. Mrs. *Dummer* has a right to cut any thing that is timber. A tree containing four cubic feet of solid timber, is generally called a *timber tree*.

Lord Chancellor.—In the old books, the distinction taken is between twenty years growth and what is *syloa cadua* (or under twenty years); for when twenty years growth it was deemed *timber*.

Mr. Attorney-General.—In *Leighton v. Leighton* in 1747, (cited ante, vol. i. p. 167.) the mansion-house being out of repair, the father cut down all, or the greatest part of the timber upon the estate, or such part as was become a shelter or ornament to the mansion; the order was that the defendant should be restrained from committing any waste or spoil upon the estate, &c. there was no order to restrain the party from cutting *thriving timber*. *Aston v. Aston* is a strong case in favour of Mrs. *Dummer*; the circumstances of it were extraordinary: where the party cuts down so much timber, that there would not be sufficient for the repairs of the estate, there the Court will interfere, and consider it as waste committed in an unreasonable and unhusbandlike manner: in that case Lord *Hardwicke* went upon *the settlement*. In the next case of *Obrien v. Obrien* (cited ante, u. s.) which was only upon an injunction and not upon the hearing, it was confined to trees intended for shelter or ornament, and to prevent the cutting saplings not proper to be felled. *Castlemain v. Craven*, was a case of a trust, and not analogous to the present instance, as it was determined upon the ground of its being a particular trust. As to satisfaction for what has been cut, in respect of *shelter or ornament*, it is an unwarrantable request on the part of the plaintiff, and no case to warrant such a demand. There is no proof of Mrs. *Dummer* cutting any saplings; as to the trees upon the lawns which have been cut, they did not constitute a part of the shelter or ornament. If there is any doubt as to evidence, the parties must have an issue.

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Mr. Morris, on the same side.—This is a special grant, and not like the case of tenant for life without impeachment of waste. Supposing

posing the party had cut down *timber* not fit for repairs, and improper to be cut ; if no injunction had been applied for, could a bill have been sustained in equity for an account of the value and satisfaction for such *timber* ? Consider the effect of the statutes of waste, the *Statutes of Marlbridge* and *Gloster*, and the *Statute of Westminster*. In this case the trees so cut by Mrs. *Dummer* were her property, and no more than a *prudent* owner would cut. The term "*thriving*" is a vague term. What is meant by "*all seasonable times*" of the year, is that the party shall not cut when the sap is up ; the trees being firmer and better when the sap is down. She might have cut the whole in the next winter under this power. Every thing must be timber which can be applied to the use of building of houses or ships, &c. A party has been restrained from cutting saplings, as destroying the *thing itself* ; no case can be produced where tenant for life without impeachment of waste, has been restrained from cutting thriving timber. *Castlemain v. Craven* does not apply : the word *unthriving* is there used with reference to the consent of the trustees. There is no case where the Court has decreed a satisfaction ; though the Court will grant its injunction, it will not direct an account of the damages done ; and though the Court might have restrained the party from cutting, it will not oblige the party to pay for what *has been cut*. No man has been compelled by this Court to account for what was his own. *Bishop of London v. Webb*, 1 P. W. 527. As to *Cardigan v. Montague*, that was a matter of partition between two tenants for life, and remainder-men in tail, where they held in moieties ; a bill not merely for an injunction, but to prevent an alteration in the estate. [Lord Chancellor held it did not apply.]

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Mr. Serjeant *Rooke*, on the same side.—This is rather a question of *satisfaction* for damages done upon the estate, than of *prevention* ; Mrs. *Dummer's* power became extinguished on her marriage with Mr. *Dance*. By the proofs in the cause, it appears there is a large number of trees still remaining upon the estate, there is no authority whatsoever to say that Mrs. *Dummer* has gone to the extremity of her power, there will be a considerable quantity of timber upon the estate before Mr. *Chamberlyne* can have the property in his possession. As to the words "*all seasonable times in the year*" they are nugatory words, for if the timber is not cut at a *seasonable period*, it will not fetch its proper value ; and whether cut at *seasonable times* or not, the remainder-man is in the same situation ; the words *full power and authority* imply, that the testator meant to leave her to her own discretion, to sell or convert the timber to any use she pleased : as to the word *timber*, we claim nothing but what is *timber*. The word *timber* may be used in several senses, as between vendor and vendee, just as the parties shall construe ; or, as in a legal one, in opposition to the *sylva cædua* ; and though the distinction may hold as to twenty years growth, between ecclesiastic and

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and layman, it does not between timber merchants ; for they regard the size as much, if not more *than the growth of timber*: the size of old timber ought to be the criterion to decide by, and though a tree may be of twenty years growth, if under size it is not deemed timber ; four feet solid is a timber tree, and so it is proved, and there is no contradictory evidence as to that point on the part of the plaintiff ; all the books upon the subject agree, that 2 feet circumference, and 6 inches and  $\frac{1}{4}$  girth, constitute the proper dimensions. This appears by *Hutton* and *Robinson's* book of Mensuration. As to what the party has cut under those dimensions, it is very trifling, not amounting to 10 ash, or so small a number as not to be worth a reference to the Master ; the trees that she has taken away, which have been but very few, were for the sake of improvement. She cannot be compelled to pay the plaintiff for them. She has as full a power as a tenant for life without impeachment of waste, and such a tenant may cut down the trees, *even in lawns and pleasure grounds*, which are not ornamental. No waste or spoil has been committed by Mrs. *Dummer*, but on the contrary, it is proved she has improved the house and gardens by cutting away some trees, which made the house damp and obstructed the light, &c. No wanton spoil has been done, and she ought not to account. As in *The Bishop of London v. Webb*, and *Rolt v. Somerville*, no satisfaction was decreed to the remainder-men for what had been cut down ; only an injunction from further cutting, granted ; so far from having cut the trees in an *unhusbandlike manner*, the evidence speaks the contrary, and that no wanton wilful waste or unnecessary damage has been done : she has acted in the most cautious manner, particularly in respect to those trees which were ornamental, as appears by her direction to the surveyor. As to *Aston v. Aston*, that was a case where a tenant for life had *absolutely stripped the estate*. *Packington's* case was of threats so to do, by the father to the son. There is nothing in this case to keep Mrs. *Dummer* in a state of litigation.

Mr. *Mitford*, on the same side.—The question is, *as to the power*, Mrs. *Dummer* derived under her husband's codicil, and, in order to understand the extent of such power, Mrs. *Dummer's* situation previous to *his adding this codicil*, must be considered. By the will, the testator had made her barely tenant for life, no freedom from impeachment of waste, or any such privilege was given her by the will. By the common law tenants in dower and guardians in socage, though they had an interest in the estate, it did not give them the privilege of waste, as a writ of *prohibition* of waste lay against such parties : as to all other persons, except in those cases, no distinction was made by the common law between an absolute fee and a limited estate, in respect to waste ; till the law interfered, when the statutes of *Marlbridge* and *Gloster* gave a remedy against the lessee for life or for years. In *Lewis Bowles's* case



case it was held, that tenant for life without impeachment of waste, had a full power over the estate, and entire property during life. The statute of *Marlbridge* only gave single damages, that of *Gloster* treble, against the lessee for life, and by the curtesy; the only remedy before against tenant by curtesy was by a writ of prohibition, and no damage could be recovered prior to the statutes. Upon a doubt whether the party was answerable for waste till after the writ of prohibition was delivered, the statute of *West. 2.* gave damages for waste before the writ delivered. By Mr. *Dummer's* will, Mrs. *Dummer* was tenant for life only, and therefore impeachable for waste; but by the codicil, she has power to cut timber, and with no restriction except such as the words "*at seasonable times,*" &c. may impose upon her. The only doubt is as to the meaning of the word *timber*, and what trees she has authority to cut under this clause. To construe this word, we must revert to the case of a tenant for life without impeachment of waste. Respecting the power such a person has to cut timber, and what kind of timber such person may cut. Such a tenant might cut trees which are not denominated timber. The age of trees is not always to be regarded, for if the trees are a seasonable wood, they may be cut as timber under twenty years growth, as is said in the old books. *Brooke's Abridgement*, tit. Waste. *Fitzherbert's Nat. Brev.* 59. Custom may determine it. By the will, Mrs. *Dummer* had power to cut down all coppice and wood usually cut. She had a right to cut *seasonable* wood, and such only has she cut; but no power to cut down trees which were commonly called timber trees, and which a tenant for life cannot cut. By the codicil she has a power to cut every thing which she had not power to cut by the will. Notwithstanding, the plaintiff contends she is only to cut some and not all. If she is to cut some, where is the *line to be drawn*? It is a matter of difficulty to do that; it is a general power, and the use of the word *timber* implies that she may cut down every thing which is timber. Supposing the testator not to mean all timber; the supposed sense must be, such trees as tenant for life not impeachable for waste, is commonly supposed to have a right to cut. It is to be presumed that the testator used the word *timber* in the vulgar and not in the legal sense. [Mr. *Milford* then observed upon the evidence, much to the same purpose as the counsel before him.] If the tenant for life without impeachment of waste, clears the wood of the rotten timber, it is good husbandry, as it promotes the growth of the other trees. There is evidence to that purpose. The power of this Court is discretionary, and must be applied to former cases. The first case is *Abruhal v. Bubb*, 2 Freem. 53. 2 Eq. Ca. Abr. 757. it shews only that *mischievous waste* ought to be restrained, and the Court might moderate that power which the law gives: no very precise rule is laid down, which shews that the Court's interference is purely a matter of discretion. There is another case before Lord Nottingham 1701, *Cook v. Whaley*, Eq. Abr.

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Abr. 400. and another case of *Williams v. Day*, 2 Ch. Ca. 32. a woman tenant in tail, after possibility of issue extinct, restrained from cutting in particular parts of the estate, because it seemed malicious. From these cases, it seems the Court will never interfere, unless a malicious intention appears in these cases. But still the timber cut was not treated as the property of the remainderman: there was nothing more than an injunction. The next case is *Vane v. Barnard*, 1 Salk. 161. 2 Vern. 738. it is considered as a leading case: it is there said, the clause of *impeachment of waste* is never extended to the destruction of *the thing itself*, but only to a fair enjoyment of it, and in *Salkeld* it is said, an injunction was granted, because of the abuse of the power, and derogatory to the grant. In Lord Somerville's case, 2 Eq. Abr. groves of trees were cut down, but the result of the case was, that the plaintiffs could not have the value of the timber, but the Court would restrain such practice. Sir Herbert Packington's case was the case of an injunction merely, it was admitted by the answer, that *many* trees had been cut down, though the Reporter erroneously states only two or three oaks. No claim was made of the trees so cut down. *Leighton v. Leighton* was an injunction merely to restrain the defendant from waste or spoil, and not from cutting the trees. [Lord Chancellor observed that injunction was very much at large.] Then came *Aston v. Aston*, before Lord Hardwicke, who considered the former cases as voluntary, *malicious*, or *intended*, or *extravagant*, or *humourous waste*. *Obrien v. Obrien* is matter of injunction only: *Piers v. Piers* is perfectly distinguishable from the present: as is *Castlemain v. Craven*. *Aston v. Aston* is not applicable, as the Court went upon the situation of the jointress, and that the trust term was only to raise so much money by sale of the timber as was necessary for repairs of the estate; and, from the nature of the settlement, the Court held she should not have the benefit of the term without making a *satisfaction* for the injury done to the estate by cutting the timber. *Lord Cardigan v. Duke of Montague* was a case of partition, and not the least applicable. From the result of the cases, it appears, that where the Court interfered on the ground of ornamental timber, it has been the intention of the tenant for life to destroy the estate, and to make it no longer a place of equal enjoyment; and the Court has not considered merely the manner of plantation of the trees. If parties were always prohibited from cutting *avenues*, rows of limes, &c. in some counties, such prohibition would prevent the party from cutting any timber. No case has warranted an account. According to the authority of *Lewis Bowles's* case, the property is not in the plaintiff, but in Mrs. Dummer; as tenant for life, she has the legal right to the property, and the Court can only restrain the party *abusing that property*.

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Lord

**Lord Chancellor.**—If the Court restrains the cutting, it goes upon the idea that the timber is not conveyed by the grant.

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**Mr. Mitford.**—Suppose the trees not to be ornamental, the property is Mrs. Dummer's; if they are ornamental, the plaintiff has a right to protect them.

**Lord Chancellor.**—This is not within the idea of waste, but destruction; Lord Coke lays it down, that if trees are not timber, yet if they afford shelter, it will be waste to cut such trees.

The operation of law preserves timber upon the inheritance, as part of such inheritance; and where it is not an *actual spoiling* of the estate, it shall not be deemed a destruction, but the property be considered as that of a tenant for life. This is a question as to the extent of the grant; for if, by law, she has a right to cut the timber, it is a gift to her of such timber; but if, according to equitable construction, she has not the grant to cut timber, the consequence of the grant not extending to it, is, that it will remain as if it had not been inserted. That seems to be the point where the difficulty arises, whether this grant extends to trees which are not *for profit*. As to the case of *Rolt v. Somerville* it came on upon demurrer, which was entirely over-ruled, so that no judgment proceeded upon it.

In the case of *The Bishop of London v. Webb*, there was not a word of an account in the prayer of the bill: the question was not agitated; no enquiry before the Master was asked for. If this case came within the description of tenant for life without impeachment of waste, trees which were cut down cannot be replaced; and though, as trees afford shelter or ornament, they might be valuable in *themselves*, and therefore the party answerable, yet as to what are cut in pleasure-grounds and gardens, they cannot come within the description of ornament or shelter.

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**Mr. Morris's** description of the power is too general: he says she might cut every thing. The codicil must be coupled with the words "*of the want of power*;" and the fair construction is, that she might cut down timber in a *husband-like* manner for her use and benefit; and had no further power. The common law knows of no distinction but under twenty years, or above that period; but the dealers in timber understand four feet solid timber; but it is questionable whether so in all situations, and that a tree of such a description is to be cut down as a timber tree. An estate may be perfectly stripped if there are no other trees left upon it; and if so, the estate might be left without timber. The most reasonable case is *Castlemain v. Craven*; though different in point of circumstances, it shews what the Court has done in respect to cutting timber, and that it has made a distinction between *thriving and unthriving* timber; though the word *timber* is used in such a general way, yet the Court will put such a reasonable construction upon it

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it as the case will bear. The words *husband-like* and *reasonable* used in *Aston v. Aston*, though perhaps *vague* and *general* in their meaning, yet, according to the judgment of persons skilled in timber, are easily defined.

Here Mrs. *Dummer* had no thought of abusing or destroying the property, she meant to occupy it as a person wishing to reside in the place, would desire to occupy it.

If it does not appear there has been destruction, it would be premature to refer it to the Master's office; if any enquiry is necessary, it would be proper to send it to a jury to enquire whether there has been any destruction committed. In *Lord Castlemain v. Craven*, the Court sent it to issues to try; 1st. the value of the thriving; 2d. of the unthriving timber. In the present case the proper issues would be; 1st. Whether Mrs. *Dummer* has cut down any trees, by which she has deprived the mansion-house of *Cranbury* or *Woolston* of any ornament or shelter; 2dly. Whether she has cut down any trees not commonly esteemed timber, and not usually cut down by tenants for life without impeachment of waste, as such.

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Mr. *Mansfield*, in reply.—It is a point of discretion, and difficult to prefix a precise rule by which the judgment of the Court is to be governed: but, considering the nature of the case, and the power under which Mrs. *Dummer* has acted, the direction must be similar to that in *Aston v. Aston*. The consequence of the preventive jurisdiction must be to give an account. Mr. *Mitford* is mistaken as to the ancient law. Till the stat. 2d of *Westminster*, there was no remedy but the writ of prohibition. An action on the case for damages would lie for waste, after the writ served. *Westm. 2.* gave the account of waste, and in analogy to it this Court has exercised its jurisdiction by injunction; and, consequently, it gives an account. Under this known power Mrs. *Dummer* has committed legal waste. Mrs. *Dummer* has a limited and special power; very unlike to that of a tenant for life without impeachment of waste; yet as she has cut a great number of trees, some of them extremely small: a number of oaks, 250 of which were valued at only 3s. and 2s. a tree. The testator's object was merely to give her a power of cutting timber for profit, and not extravagantly: not to cut down all the timber at one season, but successively. As to trees for ornament and shelter, she had no authority to cut them, as this power extended only to trees for profit. As to the issues, no such were ever directed: the former is, whether she has deprived the houses of ornament or shelter; which would be an extraordinary question to be sent to a jury: the real question is, whether the possessor who left them, left them as ornamental. The second issue, whether they were such trees as are usually cut by tenant for life without impeachment of waste, is a question of law and not of fact, fit only for a jury

jury of conveyancers: there must be such a reference as that in *Aston v. Aston*.

Lord Chancellor said—this was a very unusual application. The right is of as loose a form as any known in this Court; every diligence should be applied by the Court, to direct the enquiries in such a way as to give the least possible expense and difficulty to the parties. He therefore directed the cause to stand over till the first day of causes after the term, and desired that, in the mean time, he might be attended with copies of former decrees, and injunctions in cases of waste (a).

The

(a) It was observed by Lord Hardwicke, in the case of *Aston v. Aston*, 1 Ves. 265. that at common law, the clause without impeachment of waste only exempted tenant for life from the penalty of the statute; the recovery of treble value, and the place wasted: and his Lordship considered *Lewis Bowles's case*, 11 Co. 79. as having first determined that these words also gave the property. This opinion, if correctly reported, must have been founded upon the extra-judicial determinations of *Wray*, Chief Justice, and *Manwood*, C. B. cited in *Herlaken-den's case*, 4 Co. 62. and the case in the Year Books, 27 H. 6. These have however since been shewn not to be law; and it is clear, from the reasoning in *Lewis Bowles's case*, and the numerous authorities there cited, that the "constant opinion in all ages," was, that these words gave power to the lessee to do waste, which produced an interest in him if he executed his power during the privity of his estate; that at the time of the statute of Marlbridge, the clause was in use, and Lord Coke clearly proves, from the words of that statute, that the effect of it was not only to allow the lessee to commit waste, but also to dispose of the timber to his own use.

The necessary consequence of this determination was, that tenant for life without impeachment of waste, was not to be restrained in equity, for that would have been to determine that he should not enjoy that property which the law allowed him, *Tracey v. Tracey*, 1 Vern. 23. 1 Eq. Ab. 399. It was soon however found, that an unreasonable use might be made of this very extensive power, and therefore Courts of equity, where they discovered that tenant for life was making an

unconscientious use of this power, assumed the jurisdiction of restraining and modelling it.

The case often referred to as having established this doctrine, is that, which is so well known by the name of Lord *Barnard's case*, before Lord Cowper: this however is erroneous, as it was a common head of equitable jurisdiction even in Lord *Nottingham's* time. Thus in the case of *Abraham* (should be *Abrahall*) *v. Bubb*, (in Freem. 53. S. C. Show. 69. 1 Eq. Ab. 757.) we find his Lordship treating it as a settled point, that if tenant for life, does waste maliciously, this Court will restrain him, though he has express power to commit waste; and that he never knew an injunction in this respect denied, unless it were to Serjeant *Peck*, in Lord *Oxford's case*, and he believed he should never see this Court deny it again. His Lordship cited *The Bishop of Winchester's case*, and *Lady Evelyn's case*, as instances in which such injunctions had been granted. In other cases about the same period, the Court declared that it would restrain both tenant for life without impeachment, and tenant after possibility of issue extinct, from "wilful," "destructive," "malicious," "extravagant," or "humourous," waste, *Williams v. Day*, 2 Ch. Ca. 32. *Cooke v. Whaley*, 1 Eq. Ab. 400. *Anon.* Freem. 278.

The doctrine thus established, led the way for the celebrated determination in Lord *Barnard's case*, which certainly was one that strongly demanded the interposition of a Court of equity. The defendant having, in consequence of some displeasure against his son, got two hundred workmen together, and in a few days stripped *Raby* castle of the lead, iron, glass-doors, and boards, to the value of £3,000.

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The cause accordingly stood over, and no judgment was given till the 24th of May, 1792, when a trial at law was directed upon the

£3,000. The case is reported in several books, Gilb. Eq. Rep. 127. 1 Eq. Ab. 399. Prec. Chan. 454. 1 Salk. 161. 2 Vern. 738. Upon this authority also, Lord Hardwicke, 1 Ves. 265. declared, that if tenant for life, without impeachment of waste, were to pull down farm houses, or grub up a wood, he should not scruple to restrain him.

The foundation of this doctrine was the destruction which would otherwise come to the inheritance. The extension of it to trees planted for ornament, &c. had not yet obtained; it frequently happened therefore, that where the relief prayed was not grounded on destruction; this interference was refused. Accordingly, in the *Anonymous* case in *Freeman*, cit. sup. the defendant, though restrained from cutting down trees near the house, and fruit trees growing in the garden, was not prevented from cutting down some turrets of trees which grew a land's length from the house, under the idea of ornament, and in *Piers v. Piers*, 1 Ves. 521. where a bill was brought by a son against a father (tenant for life without impeachment), Lord Hardwicke declared, that if a son should have it in his power to call his father into a Court of equity, for any alterations he makes in a walk or an avenue, it would be such a fund for disputes between father and son, that it would have been better for the public that *Raby* castle had been pulled down, than that the precedent had been made.

It was however, about this time, that the Court began to enjoin where tenant for life, without impeachment, was taking down trees of too young a growth and unfit for timber; and though Lord Hardwicke, in *Aston v. Aston*, hints that he thought this was going too far, yet there were several precedents for it at that time, *Lord Castlemaun v. Lord Craven*, 22 Vin. Ab. 523. 2 Eq. Ab. 758. *Leighton v. Leighton*, *O'Brien v. O'Brien*, cit. 6 Ves. 111.

The next step was to restrain the cutting down of trees planted for ornament, *Charlton v. Charlton*, cit. 3 Atk. 215. where Lord King continued an injunction as to trees standing for ornament, though he dissolved it

as to straggling trees. *Packington v. Layton*, (3 Atk. 215. nom. *Packington's case*) where Lord Hardwicke granted an injunction to trees in lines and avenues on rides in a park, on the ground of their being for ornament, *Leighton v. Leighton*, and *O'Brien v. O'Brien*, cit. sup. are also precedents to this effect.

In late times the same principle has been acted upon and extended, from ornament of the house to out-houses and grounds, then to plantations, vistas, avenues, to all the rides about an estate for many miles round, and in a late case it was extended to trees planted for the purpose of excluding objects from the view, *Day v. Merry*, 16 Ves. 375. Upon the same principle it has been extended to a common, where clumps of trees were planted for the benefit of view, and as (if *de facto* planted for ornament) the remoteness or contiguity could not alter the principle, it was applied, though the common was some miles from the house, and though land belonging to other persons intervened. *Marquess of Downshire v. Lady Sandys*, 6 Ves. 106. *Jebb v. Jebb*, *Johns v. Johns*, cit. ib. *Lord Tamworth v. Earl Ferrers*, ib. 419. *Williams v. Macnamara*, 8 Ves. 70. The orders on these occasions are always drawn up in the terms used in the present case, *Lady Strathmore v. Bowes*, ante, vol. ii. 88.

The inconveniences attending this doctrine are very great: Lord Eldon has said, that he could not admit that it was wiser to extend than to confine it. On the contrary, if it were to be considered as *res integra*, the best course would be to require executors and testators to say what their own injunctions should be, rather than leave them at liberty to give legal rights, this Court being called on to determine how the parties having those legal rights may be said to execute them equitably, *Burges v. Lamb*, 16 Ves. 185. The Court has not gone further than protecting what has been planted and is now growing for ornament, and has repeatedly refused to act upon affidavits stating that the timber is ornamental, ib.

The principle seems to be, that if the grantor or testator has gratified his own taste by planting for ornament, though



the following issue, whether the defendant *Harriot*, now wife of — *Dance*, had cut any timber or other trees which had been placed, or designedly left for the ornament or shelter of the mansion-house, gardens, and pleasure-grounds at *Cranbury* and at *Woolston*; and also whether the defendant had cut any saplings or young trees down which are not proper to be felled as timber, and what damage had been sustained thereby; and the plaintiff was to be plaintiff at law, and the defendants *Dance* and his wife to be defendants, and the usual directions were given, and the consideration of costs and further directions reserved till after the trial.

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though he has adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and upon the competition between those parties, the Court should see that the tenant for life was right in point of taste, and the tenant in tail wrong, yet the taste of testator, like

his will, binds them; and it is not competent to them to substitute another species of ornament, for that which the testator designed. The question, which is the most fit method of cloathing an estate with timber, for the purpose of ornament, cannot be safely trusted to the Court, 6 Vea. 110,

(a) *ELLIS and Wife v. ATKINSON and Another.*

**P**LAINTIFF *Thomas*, the husband, being entitled to a sum of £4,000, secured on a mortgage, and it being intended previous to the marriage between plaintiffs, to settle £2,000, the moiety of the said sum, and the interest thereof, upon plaintiff *Susannah*, for her sole and separate use, and to be at her disposal notwithstanding her coverture, by indenture of lease and release, dated 7th and 8th of *February*, 1787, *Thomas* assigned to the defendants, their executors, &c. the said principal sum, and the interest thereof, and the security for the same, in trust, after the solemnization of said marriage as to £2,000, one moiety thereof, and the interest attending the same, for plaintiff *Thomas*, his executors, &c. and as to the other moiety "in trust that they, during the joint lives of plaintiffs, pay the interest of said last £2,000 to plaintiff *Susannah*'s proper hands, or to such person or persons, and for such purpose as plaintiff *Susannah*, notwithstanding her coverture, by any writing or writings under her hand, should from time to time direct and appoint, to the intent that the same might be for her sole, separate, and peculiar use and benefit, and might not be subject to the debts, control, disposition, or engagements of plaintiff *Thomas*; for which purpose the receipt of plaintiff *Susannah*, or of such person or persons as she should direct or appoint to receive such interest, should alone be a sufficient discharge for the same,

S. C.

2 *Dick.* 759.  
In Court, *Easter*  
and *Trinity*, 1789,  
24th *May*, 1792.

Husband and wife agree that the property settled to her separate use, shall be paid to the husband: the agreement shall be carried into execution by decree of this Court.

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to the said defendants; and in case *Susannah* should happen to survive the said plaintiff *Thomas*, then the said last-mentioned sum of £2,000 should immediately after his decease, be in trust for said *Susannah*, her executors, &c. but in case said *Susannah* should happen to die in his life-time, then the same should, from and immediately after her decease, be upon such trusts, and for such purposes, and in such manner and form, either absolutely or conditionally, as she, notwithstanding her coverture, by any deed or deeds, writing or writings, by her signed, sealed, and delivered in the presence of two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of her last will, by her signed in the presence of a like or greater number of such witnesses as aforesaid, should direct or appoint: and in default of such direction or appointment, or until such direction or appointment having been so made, should take effect, and when the trusts or interests thereby directed or appointed should respectively end or determine, and as to such part of the said sum of £2,000 whereof no such direction or appointment should be made, in trust for the executors or administrators of said *Susannah*, as part of her personal estate."—The marriage afterwards took effect, and the interest accruing on the £2,000 was paid to *Susannah*, up to the 8th of *August* preceding the filing of the bill; but the husband and wife having agreed that she should give up to the husband all her interest in the £2,000, she by deed poll 1st of *December*, 1788, reciting the power, "directed and appointed that plaintiff *Thomas*, or his assigns, should thenceforth, during the joint lives of said plaintiffs, receive the interest of said £2,000 for his sole use, and that in case she should die in the life-time of the said *Thomas*, the sum of £2,000 should, immediately after her decease, be in trust for the plaintiff *Thomas*, his executors, administrators, and assigns; and she (so far as she was in law or equity capable of so doing) assigned the said sum, to hold the same unto said plaintiff *Thomas*, &c." and they applied to the trustees to assign the same to plaintiff *Thomas*, and the trustees refusing to do so, without the direction of this Court, they filed their bill for that purpose.

The cause came on among the short causes, the last day but one, of *Easter Term*, 1789, when the wife attended in court to consent that the sum of £2,000 might be assigned, and the securities, &c. for the mortgage money delivered up to the plaintiff *Thomas*.

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*Lord Chancellor*, then, doubted much, whether he could take the wife's consent, but took it as far as it might be available; at the same time desiring its effect might be considered.

It came on again in *Trinity Term*.

Mr.

**Mr. Solicitor-General.**—When this question was on before, your Lordship's doubt was not as to the principal sum, but whether she could give the interest irrevocably to the husband; the interest being to be paid to such person or persons as she *from time to time* should appoint. A *feme covert* having a separate property is, as to that, a *feme sole*, *Peacock v. Monk*, 2 Ves. 190; and if she borrows money and gives a bond, that will be the foundation of a demand out of her separate property, *ib.* p. 192. So in *Norton v. Turvill*, 2 P. W. 144. the woman's separate estate was held to be liable to her bond. In *Grigby v. Cox*, 1 Ves. 517, it is held that, as to any thing settled to her sole use, she is to be considered as a *feme sole*. In *Thayer v. Gould*, cited at the end of that case, money to be laid out in land to be settled to husband for life, then to wife for life, was paid to him. In *Hulme v. Tenant*, (ante, vol. i. p. 16,) the wife joining in a bond with the husband, made her separate property liable. In *Biscoe v. Kennedy*, (cited in the note there) the wife's property so settled was considered as the property of a *feme sole*, and liable to her debt before the marriage. In *Allen v. Papworth*, 1 Ves. 163, it was held that the wife joining with the husband in bringing the bill, that her property may be applied to payment of her debts, is a sufficient appointment. Here, the money being to be paid to the use of the wife during the joint lives, a fine would have barred a similar interest in lands; and if a fine would have barred at law, her examination here is equivalent; then if she dies, the husband has, by this appointment, an interest in the fund, and if she survives, she is competent, by her assent in Court, to bind herself. Lord *Kenyon* did the same thing, upon great consideration, in the case of *Mrs. John Buller*, who was entitled to property for life, *with remainder to children*, he, with her consent, ordered a part to be raised for the advancement of a child.

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**Lord Chancellor.**—The question is, whether from the peculiarity of this trust, it did not intend the whole to go to her, if she survived. If it was not to be paid according to the instalments, then, whether the wife can dispose of her eventual interest, or of the produce in the mean time. The case before Lord *Kenyon*, was a case of general property.

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**Mr. Hollist** mentioned a case, 3 Atk. 71, *Pearson v. Brereton*, where money given to persons, in trust for the wife, to be laid out in land, was ordered, by her consent, to be paid to the husband.

This cause stood over, and came on again, when **Mr. Solicitor-General**, added to the cases he had before cited, that of *Clarke v. Pistor*, Rolls, 25th March, 1778, where, by settlement 8th February, 1776, £2,000 *Bank Stock*, was covenanted to be, and was transferred to trustees in trust to pay the interest and dividends, to such persons, in such proportions, and for such purposes, and in such

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such manner and form as plaintiff *Margaret* should, from time to time during her life, notwithstanding her coverture, by any note or writing under her hand, direct or appoint, and in default of such direction or appointment, into the proper hands of plaintiff *Margaret*, for her separate use, &c. and after the death of plaintiff *Margaret*, to transfer the *Bank Stock* unto plaintiff her husband, if then living, if not, to his executors, &c. as part of his own personal estate. On bill filed by the husband and wife against the trustees, without making any appointment, the Court, with consent of the wife in Court, decreed the transfer.

Mr. *Hollist* also added the case of *Newman v. Carlony*, 24th April, 1771, a legacy given to the wife for her sole use, with a power of appointment by will, and in default of appointment, to her executors; ordered, upon her consent, to be paid to the husband.

The cause again stood over, and was said to be compromised, but on the 24th of May, 1792, Lord Chancellor made his decree (a). That the defendants should assign the sum of £2,000, the moiety of the £4,000, secured by mortgage on the premises in question, and appointed by the indentures of settlement of the 7th and 8th days of February, 1787, for the sole and separate use of the plaintiff *Susannah*, and such interest as the Master shall find to be due, in respect of such £2,000 to the plaintiff, by virtue of, and under the deed-poll and appointment dated 1st December, 1788, and that the defendants should re-convey the mortgaged premises, free and clear of all incumbrances, to the plaintiff *Thomas Ellis*, or to whom he shall appoint, and that the plaintiff should pay unto the defendants the said costs of this suit.

(a) An erroneous notion had been entertained, (vide the note to *Pybus v. Smith*, ante, 340), that no decision had ever been given in this cause. As to the

doctrine upon the subject, see that case, and *Sockett v. Wray*, post, vol. iv. 483.

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## WOODCOCK v. The Duke of DORSET(a).

**T**HIS bill was filed by the plaintiff as administrator of the late Countess of *Thanet*, and stated that, by settlement dated 5th July, 1744, made between the Right Honourable John Earl Gower, of the first part; Lord John Sackville, second son of Lionel Duke of Dorset, and the Honourable Lady Frances Sackville his wife, one of the daughters of the said John Earl Gower, of the second part; and trustees, of the third part; reciting, among other things, the provisions made by the marriage settlement of the said Earl Gower with Lady Evelyn his first wife, and that Mrs. Gertrude Tolhurst, by her will, gave all her real and personal estate (subject to a legacy of £1,000 to the said Lady Frances) to Earl Gower, and that the said John Earl Gower had by his former wife two sons and five daughters, and that by deed-poll, dated the 6th June, then past, he had appointed £5,500 (including the said £1,000) for the provision of the said Lady Frances, and also reciting that Lord John Sackville was desirous to make a provision for himself and Lady Frances his wife, and the issue of their bodies, and to that end proposed that the said Earl Gower should pay to him £500, part of the said £5,500, and should retain the remaining £5,000 in consideration of his making an immediate provision for him and his family: It was witnessed that the trustees should, out of the rents and profits of the estate hereby conveyed to them, raise and pay the yearly sum of £200 to the said Lord John and Lady Frances, during their natural lives, and on the further trust, that if the said Lord John and Lady Frances should leave, at the death of the survivor, any child or children of their two bodies begotten, to raise the yearly sum of £200 for the maintenance of such child or children, until they should attain the age of twenty-one years, then to raise the sum of £5,000, and pay the same to such child or children, in equal shares, upon their attaining their respective ages of twenty-one years, and if there should be but one child, then to such child.

(a) Reg. Lib. B. 1791. fol. 418. this was a rehearing, in which Lord Thurlow affirmed the decree originally made by him. Reg. Lib. B. 1789. fol. 21. The statement of the facts from whence the extract of the material parts of the settlement, is taken, (which is printed in a note to *Hougrave v. Cartier*, 3 Ves. & Bea. 82.) is contained in the entry of the original hearing. It certainly differs materially from the present case, in the circumstance of the word *such* not being contained

in the direction for payment to the children. As that word is however contained in the prior directions for raising money for maintenance; and in the subsequent direction for payment, if but one child; and as Lord Thurlow appears in his judgment to have particularly noticed its existence, it is not an improbable conclusion that the word "the" may have been inserted by an error of the person who transcribed the case into the Register's book, instead of the word "such."

In Court, Mich.  
1789.

Lincoln's-Inn  
Hall, 9th May.  
1790.

24th May, 1792.

The Court will  
construe a set-  
tlement accord-  
ing to the intent  
of the parties,  
though the li-  
teral expression  
be otherwise.

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Lord *John* and Lady *Frances* had issue two children, the defendant the Duke of *Dorset*, and the late Lady *Thanet*, who died in the year 1778, having attained her age of twenty-one years, in the life-time of her mother the said Lady *Frances*, and having survived her father Lord *John*, but died in the life-time of the said Lady *Frances*.

And the question was, whether Lady *Thanet*, dying in the life-time of her mother, was entitled to a share of the £5,000 with the defendant the Duke, or he having survived his father and mother, was entitled to the whole of that sum.

Mr. *Solicitor-General* and Mr. *Campbell*, for the plaintiff, contended, that Lady *Thanet* was entitled to a moiety, notwithstanding her having died in the life-time of her mother: that the meaning of the settlement was, to provide for the issue of the marriage, not to give any thing to Lord *Gower*; if the literal construction was the true one, and both the children had died in the life-time of the mother, Lord *Gower* would have kept the money, which was part of it the property of Lady *Frances*, and not have been bound to pay it to any body.

Mr. *Mansfield* and Mr. *Partington*, for the defendant, the Duke of *Dorset*.—By the terms of the deed, unless Lord *John* and Lady *Frances* left issue, the payment of the £5,000 could never arise: and there is no doubt that parents may make such a provision; having therefore made it, it cannot be varied. *Wingrave v. Palgrave*, 1 P. W. 401.

Lord *Chancellor*.—It is impossible to say that parents may not make a provision for children which depends upon their surviving them, but this is a different case, here the contingency would be in favour of Lord *Gower*. So that the construction would be, that the lady being entitled to £5,000, it was to be given to Lord *Gower*, subject to the contingency of her and her husband having children who should survive them. It is impossible it could be intended that Lord *Gower* should take in the event, that a young woman of twenty should survive her children. There is no word used to exclude Lady *Thanet*, but the word *such*, upon which it might have been contended that the property should not vest unless the children were infants at the decease of the survivor. Though the words are strong and difficult to manage, the intention of the settlement is the truth and honour of the case (a).

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On

(a) If a settlement "clearly and unequivocally makes the right of the child to a provision, depend upon its surviving both, or either of its parents, a Court of equity has no authority to control that disposition," per Sir W.

Grant, 3 Ves. & Rep. 85. *Wingrave v. Palgrave*, 1 P. W. 401. *Hotchkin v. Humphrey*, 2 Mad. Rep. 65. But the court, considering it as a hard thing to impute to a father that he should mean, that where a child has attained

On the 24th May, 1792, Lord Chancellor decreed for the plaintiff, according to the prayer of his bill.

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attained twenty-one, or come to marriageable years, and formed a family; yet because that child dies in his life, its descendants should be left destitute; and feeling *that* not to be a probable intention in the parent, has frequently "struggled with language," and put a construction upon words, which they would not bear in the case of a stranger, upon a matter of contract, without any mixture of parental feeling. Accordingly, in the present and many other cases, the Court has leant strongly towards that construction which gives a vested interest to a

child, when that child stands in need of a provision, *Emperor v. Rolfe*, 1 Ves. 208. *Cholmondeley v. Meyrick*, 1 Eden, 77. *Rooke v. Rooke*, 2 Eden, 8. *Reynous v. Jeffreys*, ib. 365. and upon appeal 6 Bro. P. C. ed. Toml. 398. *Randall v. Metcalfe*, 3 Bro. P. C. ed. Toml. 318. *Willis v. Willis*, 3 Ves. 51. *Hope v. Lord Clifden*, 6 Ves. 499. *Schenck v. Leigh*, 9 Ves. 300. *Powis v. Burdett*, ib. 428. *King v. Hake*, ib. 438. *Bayard v. Smith*, 14 Ves. 470. *Hougrave v. Cartier*, 3 Ves. & Bea. 79. S. C. Coop. Rep. 66.

HIBBERT and Others v. ROLLESTON and Others, Assignees of
MARGETSON, a Bankrupt(a).

Lincoln's-Inn
Hall, 9th Dec.
1790.

24th May, 1792.

MMARGETSON, the bankrupt, being possessed of two bills of exchange drawn by him, on, and accepted by Messrs. Dowson and Atkinson, applied to the plaintiffs to discount them, which the plaintiffs did, and paid Margetson the value of two bills, after deducting the proper discount for the time they had to run, and Margetson indorsed the bills to the plaintiff. Before the bills became payable, Dowson and Atkinson stopped payment, and Margetson gave notice thereof to the plaintiff, and it being usual among merchants negotiating bills, in such cases, to take up the bills or give security for the payment of them, Margetson applied to the plaintiffs, and requested them to accept of his promissory notes for the sums of £2,000 payable at three months, in lieu of the said bills; but plaintiffs objecting to accept the same without further security, and Margetson being at that time sole owner of a ship called *The Commerce*, then upon her voyage home from foreign parts, he, by way of further security for the payment of the £2,000, offered to assign the ship to the plaintiffs, and the plaintiffs agreed to accept such promissory note and assignment of the ship, and to give up the two bills of exchange.

A bill of sale of a ship was made as a collateral security, and the papers, &c. delivered, but there was no recital in the bill of sale, of the registry, (pursuant to act 26 Geo. 3.) This cannot be supplied as a defective security against assignees of a bankrupt: and bill for that purpose dismissed.

In consequence of the agreement, on 21st June, 1788, the plaintiffs gave up the bills of exchange, and Margetson gave them a promissory note bearing date the said 21st of June, payable to plaintiffs, or their order, three months after date, and also executed and delivered to the plaintiffs a deed poll, or bill of sale of the

(a) Reg. Lib. A. 1791. fol. 308.

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same date, whereby he, in consideration of the said sum of £2,000, assigned the said ship then on a voyage to *Jamaica* and back, with its mast, &c. to hold to the plaintiffs to their own use, and covenanted that he had full authority to sell the premises, and that the same should remain to plaintiffs free from all former bargains, sales, and incumbrances; *Margetson* at the same time deposited with plaintiffs the grand bill of sale, and a policy of insurance which had been effected on the ship on her passage to and from *Jamaica*, and the plaintiffs signed a memorandum in writing, acknowledging the receipt thereof, and promising to return the same on payment of the promissory notes. The ship being at the time of the sale on a foreign voyage, no actual possession could be given. About the 18th of *July*, 1788, a commission of bankruptcy issued against *Margetson*, and the defendants were chosen assignees, and about the 22d of *November* the ship arriving in *England*, the plaintiffs took possession by sending a person on board her for that purpose, and the defendants also took possession of her by sending a person on board, and the plaintiffs and defendants both continued to hold such possession till the ship was sold as after-mentioned.

By an act of parliament passed in the 26th year of the reign of his present majesty, intituled * “An act for the further increase and encouragement of shipping and navigation” it is (among other things) enacted, that when and so often as the property in any ship or vessel belonging to any of his majesty’s subjects, shall be transferred to any other or others of his majesty’s subjects, in whole or in part, *the certificate of the registry of such ship or vessel shall be truly and accurately recited, in words at length, in the bill or other instrument of sale thereof, and that otherwise such bill of sale shall be utterly null and void* to all intents and purposes.

In the bill of sale or assignment of the ship *Commerce*, executed by *Margetson* the bankrupt to the plaintiffs, *there was no recital of the registry of the ship*, pursuant to the directions of the clause in the act, but the plaintiffs conceiving that, though the bill of sale was informal, yet as the ship and her papers were intended to be pledged by *Margetson* to them, and that they were entitled to have the sum of £2,000 paid them, or to have a valid bill of sale executed to them, applied to the defendants for that purpose, but the defendants refused, and in *Hilary Term* 1789 commenced an action of trover in the King’s Bench against the plaintiffs, for the recovery of the value of the ship, and the plaintiffs having pleaded the general issue, the cause was tried by a special jury, at the sittings in *London* after the said term, when a verdict was found for the plaintiffs (at law) subject to the opinion of the Court upon a case reserved.

* See a full history of this act of parliament, and its policy, in Mr. *Rice’s* “History of the Law of Shipping and Navigation,” c. 6. p. 410, especially from p. 455.

The case stood for argument in the course of the following *Easter Term*, when it appearing that both parties were in possession of the ship, the Court did not think fit to proceed to the decision of the question, and the case was altered by the rule of Court, by stating that the defendants (at law) on the arrival of the ship took and entered into possession of her; and, by a subsequent rule of Court, it was ordered that the ship should be sold, and the money arising from the sale to be laid out in the names of *Rolleston*, one of the plaintiffs in the said cause, and plaintiff *Hibbert*, and the same is now standing in their names.

The case was afterwards, in *Trinity* and *Michaelmas Terms* 1789, argued in the Court of King's Bench,* when the Court gave judgment for the plaintiffs, considering the bill of sale as null and void, by reason of the said act of parliament.

The present bill was filed in *Hilary Term* 1790, by the plaintiffs, who had been defendants at law, insisting that, although they could not make a good defence at law, by reason of the act of parliament, they had in equity a good right to hold the ship as a security for the money made payable by the promissory note, and that *Margetson*, if he had not become a bankrupt, would in equity have been bound to have made a valid assignment of the ship to them, or to have paid the money, and that the defendants as his assignees, were bound to do what the bankrupt must have done. The bill therefore prayed that *Rolleston* might be decreed to join with the plaintiff *Hibbert* in the transfer of the money produced by the sale of the ship to the plaintiffs, &c.

The cause was heard on the 9th of *December*, 1790, when Mr. *Mitford*, Mr. *Graham*, and Mr. *Steel*, argued for the plaintiffs.

It is admitted by the answer, that it was agreed between the parties that this ship should be a security. It did not rest in agreement, for the instruments were deposited on the making of the bill of sale. The act of parliament of the 26th *Geo. 3.* if any thing, must vary this from the common case of an engagement to mortgage, which must be carried into execution. There are many cases where this Court executes agreements, although the instrument made use of is invalid; and where the instrument is not good as a legal mortgage yet it shall be good as an equitable lien.

In the case of *Burgh v. Francis*, cited 1 P. W. 279, there was a defective mortgage in fee for £500, being by feoffment without livery, the estate was held in equity to be specifically bound by the mortgage.

So in (i) *Taylor v. Wheeler*, 2 Vern. 564, a mortgage was made

* See 3 Term Reports, p. 406, and *Reeves*, u. s. p. 490, for the arguments used at the bar, and by the Court at large.

(i) S. C. cited 2 Vern. p. 610.

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of a copyhold estate which was not surrendered in time, it was decreed that the mortgage, though void at law, was an equitable lien on the copyhold estate, and was aided against the assignees of a bankrupt.

In *Dale v. Smithwick*, 2 Vern. 150, it was a warrant of attorney to confess judgment in ejectment. The security was defective, but held a good agreement in equity.

Upon the principle that the assignees stand in the same situation as the bankrupt himself, the plaintiff would be entitled to the decree of this Court for a perfect conveyance of the ship, if it remained in specie; and also we are entitled to an account of the produce of the ship, it having been sold under the rule of the Court of King's Bench.

The bill of sale was intended to convey the property. If it had been barely deposited that would have been sufficient. *Russel v. Russel*, (ante, vol. i. 269.) The effect of the act done must be according to the contract of the parties.

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Here the parties had it in their power to do the act effectually, but did it improperly; but it was done for a valuable consideration, and there was no *mala fides* in the transaction. Therefore it comes within the common rule of a court of equity.

It may be argued, that here is a reason for a court of equity not interfering, arising from the policy of the statute, which declares the bill of sale to be void.

But in the statutes of *Eliz.* restraining leases of ecclesiastical persons, leases, other than such as the statute allows, are decreed to be void to all intents and purposes, yet it is held that those words shall not extend beyond the particular object of the act, viz. the disherison of successors; for it is said, 3 Bac. Abr. tit. *Leases*, that that act will not enable a bishop to defeat his own act.

We admit that the Court of King's Bench did right in an action of trover, for they must have determined that the property was transferred, but a court of equity acts in *personam*, and supplies defects by directing the legal transfer.

Where contracts are entered into, as bargain and sale without enrolment, the Court will effect the contract.

When the objects of the act are considered there will appear to be no objection arise against our demand.

If a ship was taken in execution and sold, if this act is to be construed with such strictness as the Court of King's Bench supposed, it would much embarrass the transfer of this sort of property. If a ship was taken in execution, and sold by the sheriff, the purchaser must come here for the execution of a proper bill of sale.

In *Robinson v. Bland*, Burr. 1077, the Court held, that a note given for money lost at play could not be recovered as such, but that the money might, as the security only was void.

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The sole question is, as to the construction of this act in this Court. The rule here is, that if the instrument is fair, and cannot operate one way, but can another, it shall be taken as it can operate. Thus a feoffment may be considered as a covenant to stand seised: a lease and release conveying a term of years, held to operate as a proper conveyance. The deposit of the muniments here amounted to a contract to do sufficient acts. We have a lien upon the documents, and are entitled to the same relief as if there had been no recovery in the action of trover.

Mr. Solicitor-General, Mr. Mansfield, and Mr. Cox, for the defendants.—The argument from the statute of *Elizabeth* is an argument at law. The conveyance in the present case must be taken as a void conveyance.

Granting that, where there is an instrument to make a good conveyance, a court of equity will compel a party who is competent to do so, it cannot where an act of parliament stands in the way.

This case is more like the cases in the annuity acts than those put by the counsel for the plaintiffs.

Where there is a void grant of an annuity, it never has been thought that there was any remedy in this Court, though, if the whole transaction was undone, the party might recover back the money. *Shove v. Webb*, 1 T. R. 732.

Mr. Mitford in reply.—Here the contract is established independent of the bill of sale; the case of *Taylor v. Wheeler*, decides that the imperfect execution of the contract will not invalidate the equity arising from an agreement.

Lord Chancellor (at the hearing) expressed great doubts, as to the construction of the act, and ordered the cause to stand over; and on the 24th of May, 1792, ordered the bill to stand

Dismissed without costs (a).

(a) In consequence of the doubts expressed in the argument of the present case, whether parol contracts might not be entered into, which would in this Court effectually bind the property; a declaratory clause (sect. 14.) was inserted into the 34 Geo. 3. c. 68. to remove such doubts, 6 Ves. 742. 746. 3 Meriv. 332, 333.

Lord Eldon, who was counsel in this cause, has stated, (11 Ves. 625) that though it was not decided in public, Lord Thurlow gave his reasons to the counsel on both sides; and the ground of the judgment which distinguished the case from those to which it had been compared upon the statute of Frauds, and the bargain and sale without in-

rolment, was, that the policy of that act of parliament was to make the instrument so defective, void to all intents and purposes; and the object of that policy could not be obtained if such a thing as an equitable title to the ship could subsist: as parties might rest upon their equitable title, without desiring the legal title.

It has accordingly been repeatedly stated at law, and determined in equity, that there can be no equitable title to a ship. If the forms required, are not complied with, there can be no equitable relief, either on the ground of mistake or accident, against the imperative words of these acts. *Camden v. Anderson*, 5 T. R. 709.

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Moss v. Charnock, 2 East, 399. *Curtis v. Perry*, 6 Ves. 739. *Speldt v. Lechmere*, 13 Ves. 588. *Ex parte Fallop*, 15 Ves. 60. *Ex parte Houghton*, 17 Ves. 251. *Thompson v. Leake*, 1 Mad. 39. *Thompson v. Smith*, ib. 395. *Brewster v. Clarke*, 2 Meriv. 75. *Dixon v. Ewart*, 3 Meriv. 322. It is clear that the transfer contemplated by the legislature, is such as proceeds from the contract of the parties, not that which arises by operation of law, or the act of God, as the transfer from a testator to his executors, to assignees in bankruptcy, to administrators or next of kin, 6 Ves. 746. 13 Ves. 255. 15 Ves. 68. 17 Ves. 251. And it has been settled, that the bill of sale passes the absolute property in a ship at sea, subject only to be divested in case that direction in the act which requires the indorsement on the certificate, to be made within ten days after her return, has not been complied with, *Dixon v. Ewart*, cit. sup.

Whether a Court of equity will relieve where the compliance with the

forms of the act has been prevented by the fraud of the party assigned, has been a question which has caused considerable doubt. It was very elaborately argued before Lord Eldon, assisted by Sir W. Grant, in *Mesterv. Gillespie*, 11 Ves. 631. in which the Court went as far as to direct an issue to ascertain whether the plaintiff had been wrongfully prevented from completing the assignment: but a compromise taking place, no judgment was ultimately given. The case is however extremely valuable for the very able arguments and observations which it contains. It appears however that the opinion of Sir W. Grant, is against such equitable interference, as on two subsequent occasions, both of them cases of fraud, he refused to grant it, *Newnham v. Graves*, 23d April, 1808. and *Barker v. Chapman*, 3d March, 1812. 1 Mad. Rep. 399, n.

The cases at law upon these acts, are collected and arranged in a very very valuable note to them in Mr. Evans's collection.

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8th and 9th Feb.
1791.

24th May, 1792.

Parol evidence not admissible to raise an equity, that a pension granted by the Crown to the defendant, was in trust for the plaintiff against the oath of the defendant in his answer.

Lady MARGARET FORDYCE v. WILLIS and Others,
his Assignees.

THIS bill prayed that the defendant *Willis* might be declared to be a trustee of the pension of £150 in the bill mentioned, for the plaintiff, and that he might be directed to execute a declaration of trust thereof accordingly; and likewise a power of attorney to authorise the plaintiff to receive the arrears and growing payments thereof, and to deliver up the grant or warrant of the said pension.

For this purpose, the bill stated that, in the beginning of the year 1782 application was made to government for a grant of a pension for the plaintiff, and that government agreed to grant her a pension of £150 *per annum*; but that the plaintiff being at that time a married woman, and living separate from her husband, it was necessary the grant should be to some person in trust for her: that *Richard Atkinson* deceased, had the management of all the plaintiff's money concerns, and proposed that *Richard Willis* (father of the defendant *James Willis*) should be such trustee; but he being of an advanced age, it was afterwards proposed that the name of the defendant *James Willis* should be inserted in the grant, as grantee thereof, and that his name was so inserted. The bill

then set forth a warrant for a pension of £150, dated 19th March, 1782, to *James Willis*. And the bill further stated that a grant was delivered by the officers of the treasury to *Richard Atkinson*, in whose custody it continued till the time of his death, was never delivered, or even shewn to the defendant *Willis*: that at the time the said pension was so granted for the benefit of plaintiff, similar pensions of £150 *per annum* were granted to two of the plaintiff's sisters, *Lady Ann Lindsey* and *Lady Elizabeth Lindsey*; and that her said two sisters being then unmarried, pensions were granted to them in their own names; that *Richard Atkinson* died in 1785; and that upon his death the grant of the pension was found by *Richard Mure*, Esq. one of his executors, among the papers of said *Richard Atkinson*, intermixed with other papers relative to the money concerns of the plaintiff: that after the death of *Atkinson*, the defendant *Willis* was requested to meet *Robert Mure* and the plaintiff, at the plaintiff's house, to settle the proper mode of receiving the arrears and growing payments of the pension; when the grant being produced by the said *Robert Mure*, the defendant *Willis* surreptitiously took the warrant, and refused to redeliver the same, alledging (though he knew the same to be untrue) that probably the warrant was intended for himself, as Mr. *Atkinson* was his great friend; and the defendant left the house, and took with him the warrant: that the defendant *Willis* afterwards declined insisting on the grant being for his own benefit, but pretended, if he was a trustee for any person, it was for *Atkinson*, though *Robert Mure*, the executor of *Atkinson*, disclaimed the same, and declared that the plaintiff alone was entitled to it: that no application had been made by *Willis* for such pension, nor had he ever received any payments on account thereof; that a meeting was proposed between the plaintiff, the defendant *Willis*, and other persons acquainted with the transactions, which *Willis* at first promised to attend, but which he afterwards declined: that a commission of bankrupt was issued against the defendant *Willis*, 3d of November, 1788, and the other defendants were chosen assignees: the plaintiff therefore charged that the defendant *Willis*'s name was used only as a trustee for her; and, among other things, she charged, that *Atkinson* kept an account of the fortune to which the plaintiff was entitled, and that an account thereof was found among his papers after his decease; and that the article "pensions £300" mentioned in the schedule in the bill, alluded to the aforesaid pension of £150, together with another pension of £150 granted to the plaintiff on certain revenues in *Scotland*, and which makes up the sum of £300; and is a proof that the grant of the said pension was intended by *R. Atkinson* for the plaintiff.

The defendant *Willis*, by his answer said, that he could not set forth why his name was made use of in the grant; save that he believed, from the action and conversation of *Atkinson*, that his,

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the defendant's name, was inserted in said grant for his own benefit, and not in trust for the plaintiff; and that about twelve months after the date of the grant, *Atkinson* gave the same to the defendant, and said there was something for him, and desired him to go to the treasury and receive the same, or used words to that effect; that he thereupon cast his eye over the grant, and thanked *Atkinson* for it, he having promised the defendant to use his interest with administration to procure something for him; and the defendant did therefore think that the grant had been obtained by *Atkinson* for the defendant's own benefit; and the defendant was confirmed in that belief, as *Atkinson* had not, either before or since the said grant, obtained any pension or emolument for the defendant: that upon his receiving the grant he went to the treasury, where he was informed *the grant had not been registered*, and therefore the pension could not be paid; that he thereupon waited on *Atkinson*, who desired the defendant would give him back the grant, and he would get it registered, and that he never afterwards received back the grant from *Atkinson*. He said the first time he heard of said grant was from *Atkinson*, as aforesaid; and that *Atkinson* never did, to the best of his recollection or belief, give him any intimation that his name was used in the grant as a trustee for any person, or require the defendant to execute any letter of attorney, to enable any other person to receive the same. He admitted that similar pensions had been granted to the plaintiff's sisters in their own names, and that the grant was found by *Mure* among *Atkinson's* papers. He admitted the meeting at plaintiff's house, but said it was for the purpose of having an explanation relative to plaintiff's claim of the pension; that *Mure* produced the warrant, and that defendant claimed it as his own; and after some conversation, took away the warrant, which he stated to be in the hands of the co-defendants, his assignees, having been delivered to them, among other papers, at his examination before the commissioners. He admitted having declined being present at the second meeting because the particular friends of the plaintiff were to be present. He said that he never was informed by *Atkinson* that his name was used in the said grant in trust for the plaintiff, or any thing of that kind.

The assignees, by their answer, claimed the benefit of the grant on behalf of themselves and the other creditors.

The plaintiff having, after filing the bill, discovered the paper mentioned in the schedule, an order was obtained for amending the bill; and it was accordingly amended, by adding that fact: and a joint answer was put in by all the defendants, denying their knowledge whether *Atkinson* kept any account of the plaintiff's fortune, or whether such paper was found among *Atkinson's* papers; or whether the words "pensions £300" did or did not include the pension of £150; but defendant *Willis* again denied his belief that the said pension was granted to him in trust for the plaintiff: and the

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the defendants insisted, that the said words "pensions £300" in said paper, was not any proof that *Atkinson* intended the grant of the pension for the benefit of the plaintiff.

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The cause was heard the 8th and 9th days of *February*, 1791.

Mr. *Solicitor-General* (for the plaintiffs) stated the facts as stated in the bill, and the prayer.—That the application to the Crown was for the extension of its bounty to this family; that two pensions had been granted, one on the *Scotch*, the other on the *English* establishment; that the grant on the *Scotch* establishment, was in the name of Mr. *Montgomery*, who had never disputed its being in trust for the plaintiff; that the pension on the *English* establishment was granted to *Willis*, and that it would be most clearly made out in evidence, that this was also intended to be in trust for the plaintiff, and that *Willis* in his answer had spoken with little regard to truth. That the instrument was always kept in the hands of *Atkinson*, who had in writing (*i. e.* by the schedule) declared the trust thereof. Mr. *Solicitor* then offered to read evidence.

Mr. *Lloyd*, for the defendant, opposed the reading parol evidence as inadmissible.

Mr. *Mansfield* and Mr. *Campbell* maintained the admissibility of the evidence, as not tending to shew the meaning of the deed to be other than appeared on the face of it, but purporting only to raise a trust; and that with respect to personal estate there was no objection to a trust being raised by parol, the statute of Frauds applying only to land. *Nabb v. Nabb*, 10 Mod. 404.

Mr. *Lloyd* maintained his objection against reading the evidence, as being contrary to the written instrument, which purports to be a grant to *Willis* without any terms. Evidence can only be read in cases of *resulting trusts*, or *trusts arising by implication of law*, where the party has paid the consideration. Here it appears, by the answer, that the grant was delivered by *Atkinson* to the defendant *Willis*, and was never in the possession of the plaintiff; and that *Atkinson* never mentioned his intention that it was for any other person than *Willis* himself, and parol evidence will never be admitted against the positive oath of the party. This is a case where the King was imposed upon, if one person was declared, and another person intended to have the pension: parol evidence cannot be read in such a case.

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Lord Chancellor.—This proceeds upon a trust arising from the intention of the donor, but where there is no declaration of such donor's

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donor's intention; and the question is, *whether parol evidence can be read to prove the intention of the donor.*

Mr. Solicitor-General.—There are two very different questions. The first, whether this evidence can be read against *Willis*: the second, whether he can object the intention of another as the intention of the donor. With respect to the first, the statute of Frauds applies only to lands, tenements, and hereditaments, and extends only to deeds or wills. If it required an act of parliament to exclude raising trusts by parol as to lands, it must have been such trusts raisable by parol as to personal estate. With respect to the intention of the donor, he having disposed of his whole interest by the gift, it is difficult to say that the donee shall object to reading evidence to shew the intention of the donor, who has no longer any interest left.

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Mr. Solicitor-General then stated the evidence to be a deposition of *John Robinson*, Esq. (late secretary of the treasury) that in the beginning of 1782 applications were made to government for warrants for pensions to the plaintiff and her sisters; and the witness, as secretary, received directions for such warrants; but it being suggested by *Atkinson*, that questions might arise touching the plaintiff's pension, she being then under coverture of *Alexander Fordyce*, Esq. it was requested that the warrants for plaintiff's pensions should be made out in the name of trustees; and Lord *North* having consented thereto, the warrants were accordingly made out in the names of *Willis* and *Montgomery*, for the benefit of the plaintiff, Mr. *Atkinson* having brought those names to the treasury, as the persons wished to be the trustees; and that the deponent always understood that the pensions so granted were not intended either for *Willis* or *Montgomery*, but for the plaintiff.

Lady *Ann Lindsay* (sister to the plaintiff) by her deposition corroborated this evidence; and stated conversations with *Atkinson* on the subject of the pensions; and that Mr. *Atkinson* proposed that the defendant's name should be made use of in the grant of the pension on the *English* establishment; and that *Atkinson* afterwards told the plaintiff (in deponent's presence) that Mr. *Montgomery's* name stood in the grant of *her* pension on the *Scotch* establishment, and the name of Mr. *Willis* in the grant of the pension on the *English* establishment. She further proved that *Atkinson* paid the plaintiff the pension till his death; and that upon her applying to him about a year before his death, for the last half year of her pension, *Atkinson* told her, she should be paid the next day, but that he had been careless enough never to have received *her* pension on the *English* establishment in the name of *Willis* from the treasury, but he would forthwith receive the arrears of the pension, which the deponent believed he never did.

This witness, and Mr. *Mure*, proved the exhibit to be the hand-

hand-writing of *Atkinson*; and *Lady Ann* spoke to the article of "pensions £300" as part of plaintiff's annual income, being the two pensions of £150 each, on the *Scotch* and *English* establishments.

Lord *Balcarras* (the plaintiff's brother) deposed also to *Atkinson's* proposing *Willis* as a trustee, and to a conversation with *Willis* after the death of *Atkinson*; in which *Willis* said, that if the witness would bring together the parties concerned in granting to him the pension, said to be for the plaintiff, he would meet them, and if he was convinced that the pension was intended for the plaintiff, and not for him, he would give up his pretensions.

*Mure* also spoke to his producing the paper found among *Atkinson's* at the meeting at the plaintiffs, and then he laid the same upon the table, before all the parties; that in the course of the conversation the defendant took up the paper and carried it away with him, but denied that he delivered the paper to the deponent; or that he (the deponent) obtained the same as executor of *Atkinson*.

Mr. *Mansfield* and Mr. *Campbell* argued, from the conduct of the defendant *Willis*, that it amounted to an admission of the trust: that a parol declaration of the defendant *Willis* would be admissible, and this was equally strong, and if *any* parol evidence was admissible, *all* was so.

Lord *Chancellor* said it struck him as a difficult thing what to do upon circumstantial evidence in a case of this kind, that the awkwardness of the case arose from employing a man whom nobody knew, without taking any declaration of trust from him, and without calling for payment for so long a time.

The cause came on again the next day.

Mr. *Lloyd* for the defendants.—Though this cause is of no great importance, in point of value, it is of great consequence to have this matter settled in point of precedent. I have therefore made all the enquiry I could, but it is surprising how little is to be found concerning it. It is not clear either way whether parol evidence can be admitted. The question is, whether the parol evidence of third persons, declaring the intention of the parties, at the time the pension was granted, can be admitted in a case where the grant is unambiguous, where there is no fraud or surprise, and where the deed as absolutely vests the interest in the grantor as in a feoffment. There is no case, before the statute of Frauds, where the deed was complete, that notice could have been averred contrary to the feoffment or assurance, 4 Bac. Abr. 342. 692; where the use was expressed in the deed no other use could be averred; but where there was no use there the averment was admitted. Here the grant to the defendant *Willis* is as complete as a conveyance under the statute of Uses where an use is declared.

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*Lord Chancellor.*—The common doctrine is, that an use might be averred, subsequent to the statute of Uses, *Lord Anglesea v. Altham*, Pigott's Recoveries, 552. 2 Salk. 676.

*Mr. Lloyd.*—There is a great difference between the use being averred to have resulted to the party himself, and a trust raised for third persons; this is an endeavour to raise a trust for third persons. A resulting trust can only arise by operation of law, 2 Atk. 150. It results if not disposed of. It may be prevented from resulting by parol declaration; but that is different from raising a trust for third persons. In *Bellasis v. Compton*, 2 Vern. 294, there being an express use it barred the resulting trust. Parol evidence can never be admitted where the deed is clear. *Cheney's case*, 5 Rep. 68, is of a latent ambiguity, the two sons being of the same name. The statute of Frauds has not made any difference as to the admissibility of evidence in these cases. The case of *Lowfield v. Stoneham*, 2 Str. 1261, shews that the Court will not admit parol evidence to explain a will of personalty. And the same was held in the case of *Brown v. Selwyn*, Forr. 240, and the *Earl of Inchiquin v. O'Brien*, 4 Barn. Eccl. Law, 122 (k). It cannot find a case where the Court has raised a trust in such a case, or where the Court has said, that upon a complete instrument they will admit parol evidence to explain the intention. In *Kirk v. Webb*, Pre. Ch. 84, in the argument of the counsel for the defendant it is said, "it must be considered how it was before the statute of Frauds, and how it would be since: before the statute it was never held to be a trust, unless there was a declaration in the deed to that purpose: and much less can it be so since the statute; for, by the statute, there can be no trust, unless it be declared in writing, (which is not in this case) and if it be a resulting trust, it is made so by parol proof, contrary to the deed, which is directly contrary to the statute, and would introduce all the mischief that it is intended to prevent." It will be difficult to distinguish this case in point of mischief from that of the executor. That is, that if a man makes a will, and appoints an executor, and does not dispose of the residue, the executor shall take it: and no parol evidence shall be read to oust him of his legal right, though he may produce evidence against the next of kin in support of his legal right, *Lady Osborne v. Villars*, 2 Eq. Cas. Ab. 410. *Brown v. Selwyn*, Forr. 240, where the parol evidence was refused against the executor's legal right. In *Bellamy v. Burrow*, Forr. 97, it was not pretended that, if the patent had been perfect, parol evidence could have been read to raise a trust. It has been lately determined in the Common Pleas, that a trust cannot be raised in such an office. Suppose *A.* was to transfer stock to *B.* without any trust declared, and the creditor of *A.* was to file a bill against

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(k). See also *Tinney v. Tinney*, 3 Atk. p. 2.

*B.* and



*B. and B. to swear there was no trust, B. could not be turned by parol evidence into a trustee.* Suppose a father purchased a personal annuity for a son who was emancipated, could he be admitted to prove, by parol, that it was for another son; though, if he paid the money for it, it might raise a trust for himself?

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*Lord Chancellor.*—Is there any case, where the purchase was made for a stranger, of its being turned into a trust?

*Mr. Lloyd.*—The admission of parol evidence is as dangerous now with respect to personal as real estate:

But even supposing it admissible, the acts of the parties here are too slight to raise a trust. The Court has always said that for that purpose the evidence must be clear and indisputable.

*Robinson* says applications were made on behalf of the plaintiff and Lady *Ann Lindsay*, but does not say *by whom*; but that *Atkinson* proposed the warrant should be made out to persons as trustees, *to the best of his knowledge*. Nothing can be so uncertain as this: it is from mere recollection since the year 1782. That is really the only evidence that is material, for Lady *Ann* only says, the plaintiff drew on *Atkinson*, and was paid by him; but she might draw on him for sums to the same amount on other accounts. *Atkinson* seems never to have settled with *Willis* whether he should or should not be a trustee; and, in fact, kept the king's bounty in his own power. Lord *Balcarras* was only informed of the facts as sworn to by *Atkinson*. He does not say *Willis* declared he was a trustee, but only that, if he was satisfied it was so intended, he would withdraw his pretensions. *Mure* says he produced the papers: Nothing is to be drawn from his evidence; but it shews that, in his idea, there was a dispute as to the right to the warrant; and that *Willis* took it up before them all, claiming it as his property. *Atkinson* lived till 1785: nothing was done in that time on the trust. *Willis* swears *Atkinson* gave the warrant to him, as *something for himself*, and that it was returned to *Atkinson* only for the purpose of being registered, and remained with him till his death. It is hardly probable, had the intention been as the plaintiff contends, that *Atkinson* would have left it so long in uncertainty, and never have informed *Willis* that he was a trustee; it is impossible that, if he meant him to be so, he should have never made any declaration to that effect before witnesses.

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*Mr. Solicitor-General* in reply.—*Mr. Lloyd* has confounded two things that are perfectly distinct. Whether parol evidence can be admitted to contradict a deed, is one thing. Whether it can be admitted to raise a trust where the deed is not contradicted, is another. The question here is, whether circumstances might not exist to convert the legal estate of *A. B.* to a trust for the benefit of

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of *C. D.* If one gives a legacy to *A.* there is not a doubt that it might be shewn to be in trust for *B.*; there is no doubt that parol evidence might be admitted of a conversation to shew it was so intended. I admit this sort of case has been determined on the ground of fraud.

Put the case, that the application was made expressly for Lady *Margaret*, and agreed to on the part of the Crown, that it was supposed to be the best way to grant it to *Willis*, and therefore it was granted to him. If parol evidence could not be admitted, suppose Lady *Margaret's* circumstances changed, she could not give it up, but *Willis* might insist upon it against the Crown; surely it would be competent to the Crown to shew there was no communication with *Willis*, and that he was meant merely to be a trustee; yet this must be, and could only be by parol evidence.

If one make a conveyance in favour of a son, but does not deliver it, but gives it to a third person to keep till the son does a certain act for his younger brother, the delivery not being complete, would it not be competent to the father to shew for what purpose it was put into the hands of a third person?

[587] *Lord Chancellor.*—If he delivers it to a third person, except as an escrow, the deed is complete.

Mr. Solicitor-General.—The case of *Bellamy v. Burrows* never could have been determined but upon the idea that a trust might be raised by parol.

Lord Chancellor.—I have been so accustomed to consider uses as averrable, that I should have thought it might be raised by parol. Perhaps, when looked into, the cases may relate to feoffment, not to conveyances by bargain and sale, or lease and release. Suppose, before the statute of Frauds, a conveyance had been to *A.* and his heirs, to the use of *A.* and his heirs, you might have proved a trust as well as before the statute of Uses. If you could have proved the use before the statute a trust might be averred since. But no use ever could be averred against an express declaration of trust. If it is a general maxim, that with respect to *personalty*, the case is the same now as before the statute, the use must be averrable.

Mr. Solicitor-General.—In *Dyer v. Dyer* (a), in the Exchequer, a purchase was made by the father, in the name of the son; it was held that *primâ facie*, it was an advancement; but the father might, by parol, at the time, declare the son a trustee.

Lord Chancellor.—Here is no presumption of a trust. If any trust is declared it must arise *ex contractu*. Suppose the declaration of the Crown clearly expressed, it is purely a grant of bounty,

(a) Since reported, 2 Cox, 92.

upon motives of honour; the question is, whether parol evidence can be received in such a case.

Mr. Solicitor-General.—*Atkinson* must be presumed to have paid the pension as the agent of the Crown.

Lord Chancellor.—The evidence goes to prove, that he paid the pension *quâ* pension, but it was never registered. I have great doubts whether you can go to the treasury and get it out of the servants there, in conversation, for whom the royal bounty was intended. It will be extraordinary to gather it from them. No account is given why the interest was not put an end to. In 1785 there might have been an application to the crown. As to the king's having any bounty towards *Willis*, if I was to indulge conjecture, I cannot so readily conceive it, as that it was towards a Lady of a great family who was in want of it; I will not absolutely dismiss the bill now.

But his Lordship, by order 24th *May*, 1792, dismissed the bill without costs (a).

(a) It is remarkable how little is to be met with in the books upon this subject. It is clear that the 7th section of the statute of Frauds only extends to declarations of trusts of land, which requires, not that they shall be created, but that they shall be manifested and proved by writing, *Forster v. Hale*, 3 Ves. 696. *Randall v. Morgan*, 12 Ves. 74. Declarations of trust of personal property are therefore in the same situation as all declarations

of trust were before the statute. The Editor has however not been able to find an instance of a declaration of trust of personal property, evidenced only by parol, having been carried into execution. The case of *Nah v. Nah*, 10 Mod. 404, which is usually cited for the proposition, (Sand. on Uses, 251. Roberts on Frauds, 94.) is merely a *dictum* of Lord *Macclesfield*, the trust having been established on the admission in the answer.

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**C**ATHERINE NASH, being possessed of very considerable personal, but not seised of any real estate, made her will, 12th of *June*, 1783, and after giving legacies to several persons therein named, gave "all the rest and residue of her real and personal estate, of what nature, kind, or sort soever," to three of the relators, and to the defendants, and a person since deceased, their heirs, &c. upon the following trust, *viz.* "upon trust, that they the said trustees, their heirs or assigns, or the major part of them,

(a) Reg. Lib. A. 1791. fol. 568.

that purpose;" the trustees purchased land with their own money, which they offered to give the charity. To a bill, praying that the charity might be carried into effect, a demurrer that the charitable legacies were void, allowed.

Lincoln's-Inn  
Hall, 15th, 17th  
*Jan.* 1791.  
24th *May*, 1792.

Testatrix gave the residue of her personal estates to trustees to "cause to be erected and built a dwelling-house to be appropriated for the use of a school-house, and directed her trustees to purchase land for

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should, as soon as conveniently might be after her decease, *cause to be erected and built*, within that part of the parish of *St. Peter* as is within the borough of *Droitwich* and county of *Worcester*, a dwelling-house or tenement, of such size or dimensions as they her said trustees should see proper and expedient, and that the same, when erected and built, should be by them the said trustees appropriated for the use of a school-house, for the purpose of educating, cloathing, and maintaining such a number of poor boys and girls, parishioners within the said parish, as her said trustees and their heirs should see proper, and find the interest, produce, and profits of her said real and personal estates and effects sufficient to support and maintain, according to the true intent and meaning of her will;" and gave several directions for the government of the said school, and then went on thus: "and she did thereby *direct and empower her said trustees, out of her real and personal estate*, to purchase such spot of ground within the said parish of *St. Peter*, as they should see proper, for the purpose of erecting the said house or school upon," and appointed the said plaintiffs and defendants executors.

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*Treadway Nash*, the brother of the testatrix, after her decease, got possession of her will, and also of the property, and prevailed with the other defendants to renounce the probate of the will, which occasioned a contest in the Spiritual Court, where, after a decree in favour of the will, probate thereof was granted to the relators, who being advised that so much of the will as directed the purchase of a spot of ground for the purpose of erecting the school, was void by the Mortmain Act; but that if a spot of ground, of the description in the testator's will, could be procured by other means than purchase out of the estate of the testatrix, they might erect a school thereon, purchased, *with their own money, a proper spot of ground*, which they had conveyed to them, and which by the present bill, they offered to give and appropriate to the charity.

The bill therefore prayed an account of the testatrix's property, and that the charity might be carried into effect.

To so much of the bill as prayed that the charity might be carried into execution, the defendant *Treadway Nash* demurred, and shewed for cause of demurrer, that the charitable legacies were void in law.

The cause was heard at *Lincoln's-Inn Hall* the 15th and 17th of *January*, 1791.

Mr. *Solicitor-General*, Mr. *Mitford*, and Mr. *Cox*, in support of the demurrer.—The general scheme of the will is, that money is to be raised out of the real and personal estate, to purchase ground, and to build the house: which is contrary to the Mortmain Act. In *Vaughan v. Farrer*, 2 Ves. 182, Lord *Hardwicke* went a great way to support the charity; but, even upon his own

own principles, he could not have maintained the present case. He there held, that *there was no direction to lay out any part of the money in purchasing land*, for that erect as much imports foundation as building, and that if any person would give a piece of land, they might build upon it. In *Gastril v. Baker*, cited in that case, there was no direction to buy land, the words were, "in order to, and towards erecting a school;" and Lord *Hardwicke* thought the trustees might hire a house. But in this case the trustees are *directed to buy land* upon which the school is to be built. Indeed if they had been directed by the will to hire a house, it would have been the same thing as if the testatrix had given a leasehold estate, which would undoubtedly be bad. *The Attorney-General v. Bowles*, 3 Atk. 806, comes somewhat nearer the present case, as there was something like a direction to purchase land: the question was, whether the bequest was void? and it was held to be so, as the money was directed to be laid out upon *real securities*. Personal estate to be laid out in land is no more to be given by the statute than land itself. Here the testatrix has been incautious enough to direct her trustees to lay the money out in the purchase of lands, and it is impossible her want of caution can be made good by the caution of the trustees, in obtaining land by other means. Lord *Hardwicke*, in the cases already cited, has, it is true, said, that if any body would give land, or there was land already in mortmain in the parish, that the trustees might build upon it. In *Attorney-General v. Tyndall* (a), (ante, vol. i. p. 444. n. Amb. 614. Highmore on Mortmain, 100). Lord *Northington*, with these authorities before him, and upon great consideration, for the case came before him upon an appeal from the Rolls, was of a different opinion. He thought *that* a direction to purchase land, not to build on land that came by other means, that supposing *Bowles's* case to be right, still that, in that case, the testatrix meant the ground to be purchased with her money; that to make her go a begging for land was not within their intention. This is an authority that goes the whole length of the present case. In *The Attorney-General v. Hutchinson*, (ante, vol. i. p. 444, note, and reported by Mr. Ambler, 751, by the name of *Attorney-General v. Hyde*), though there was a piece of ground already in mortmain in the parish, the testatrix not having pointed to it, Lord *Bathurst* held the devise void. *Where the devise is not good at the testator's death, it cannot be made so by any thing which arises after*. This was held in *Widmore v. Woodroffe*, (Amb. 636.) where the devise was declared void, because the Corporation for Queen *Anne's* bounty are bound by their rules to lay out the money in land, though the crown has power to make new rules, it was held, that it must be regulated by the rules in being at the testator's decease. In *Pelham v. An-*

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(a) Since reported from his Lordship's MSS. 2 Eden, 207.

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*derston (a)*, (ante, vol. i. p. 444. note,) a bequest to build and erect an hospital was held void. Lord Camden thought it impossible to separate the one part from the other. It is true, where there is an option to the trustees to lay the money out in land, or in such a way that it may continue personal, the Court has carried it into execution in the way that was legal; this is the ground upon which *Soresby v. Hollings*, (Highmore, 74.) was determined. In *The Attorney-General v. Goulding*, (ante, vol. ii. p. 428.) the gift of the eight freehold houses to the charitable use being void, Mr. Justice Buller thought the gift of the personal fund that was annexed to the houses was void also. In *Foy v. Foy (b)*, Rolls, 1st February, 1785, which was a gift of £1,000, toward the erection, &c. of an hospital for the county of Gloucester, Lord Kenyon directed an enquiry, whether there was any hospital in the county to which it might be applied; and in *The Attorney-General v. The Bishop of Oxford*, (ante, vol. i. p. 444. note,) he declared he could not vary the use, by ordering a repair where the testator ordered a building, for he said, the intention must be implicitly followed, or nothing could be done.

Mr. Attorney-General, Mr. Mansfield, and Mr. Stratford, in support of the charity.—The first question is, whether, notwithstanding the bill states land to be ready for the purpose of building the school, the gift is void: and with respect to this, we may observe, that wherever the direction is *only to erect and build*, without any necessity to purchase land, it may be so done as not to be within the statute. None of the cases before the Court have been upon the subject of amelioration only of land already procured, *but where land must necessarily be purchased*; where that is not the case, the statute does not apply. Therefore in *Harris v. Barnes*, Amb. 651. money left to be laid out in repairing a chapel, was held not to be within the act; the note of that case gives the true sense of the Statute of Mortmain, that it was to prevent the increase of lands, &c. whereas, where the object of the gift is only the amelioration of land already in mortmain, not an acre more gets into mortmain than was so before. According to the cases of *Vaughan v. Farrer*, and *The Attorney-General v. Bowles*, the charity in the present case may be supported without infringing upon the statute. In the former of those cases, Lord Hardwicke thought, that if any body would give land, they might build upon it; so here, if a house could be obtained, it would be unnecessary to build one; if land could be obtained, an house might be built; but in this case, the building of an house is unnecessary, for though the meaning of erecting an hospital, is, that the patients may be together, and if there is no house, the general

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(a) Reported from Lord Northington's MSS. 2 Eden, 296.

(b) 1 Cox, 163.



intention cannot be executed, it is not so of a school, the education of children does not induce the same necessity, it may be carried into execution without a room being appropriated to it. The present case is said to be within the case of *The Attorney-General v. Tyndall*, that it is a direction to purchase land. It is said in that case, that a direction to build, is a direction to purchase, and that the Court would have directed the trustees (except for the statute) to lay out money in land, upon which to build: then it can make no distinction whether the testator directs the building of an house, which cannot be done without land, or he directs land to be purchased. In *The Attorney-General v. Lady Downing*, Amb. 555, Mr. Attorney-General York took notice of the distinction between *The Attorney-General v. Tyndall*, and *The Attorney-General v. Bowles*, and the Lord Chancellor agreed to the distinction, and said, in *The Attorney-General v. Tyndall*, the intention was to purchase land; but in the present case, in directing a purchase of land, she only meant, in case it should be necessary; she did not mean to preclude her trustees from accepting a donation of land, which would increase her fund. If the cases before Lord Hardwicke are right, those before Lord Northington must be wrong, as to this point. In the case of *Grimmet v. Grimmet*, Amb. 210, money to be laid out in the funds, till it could be laid out in land to the satisfaction of the trustees, was held not within the statute, because it might remain for ever in the funds. In the case before Lord Bathurst (*Attorney-General v. Hyde*, Amb. 751,) his Lordship thought that the case before Lord Northington had over-ruled that before Lord Hardwicke, and he seems to think, that the testator must have some particular piece of land in mortmain, in his contemplation, and in fact it turned out in that case, that there was no land. In *Pelham v. Anderson*, it was not made part of the case that there was any land. *The Attorney-General v. Goulding* is very distinguishable; the very import there was, to bring the people together, the principal intention could not take place without a breach of the statute of Mortmain, and therefore that which was consequential only, could not take place. As to applying it *cy pres*, the cases stand as they did, untouched by the statute of Mortmain, as in the case where the gift was to such Lying-in-hospital as the testator should appoint, (*White v. White*, ante, vol. i. p. 12.) and the testator made no appointment, the Court applied the bequest; so in the case of superstitious uses; it was to be applied to a charitable use.

Mr. Solicitor-General in reply.—The question is, whether the intention in this case can be legally carried into execution; in order to discover this, it will be necessary to make some observations on the cases: the principle to be drawn from them is, that in every case upon a will, where there is a direction to endow a school or hospital, and no land already in mortmain is pointed out,

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on which the building is to be, it is void, although the erection of the school or hospital, be the principal thing in the intention of the testator; and the cases are uniform, where there is a direction to purchase, that the gift is void. In *Foy v. Foy*, Mich. 1785, the proposition is laid down, that where the gift is for erecting and endowing a school or hospital, there the Court implies, *that a purchase is to be made*; in that case the testator gave £1,000 towards the erection and endowment of an hospital in the county of *Gloucester*; it was not the sole fund, but in aid of a subscription for that purpose; and Lord *Kenyon* (then Master of the Rolls) referred it to the Master, to enquire whether there was an hospital: the next clause in the will was, "I give £800 for the purpose of erecting and endowing a school." On these two clauses the determinations were different; the former was referred to the Master, because the testator pointed to the hospital which was then erecting; but as to the latter, his Honour declared it void, and said he should have declared the other void also, if there had not been an hospital existing. The principle is this, that though Lord *Hardwicke* in *Vaughan v. Farrer*, following the case of *Gastril v. Baker*, said, if any one would give land the charity should be supported, yet he never meant to say, that a gift to erect and endow simply was not void: the distinction is, that where the situation is pointed out, and is already in mortmain, the gift is good; where it is not so, it is bad. Then the question is, whether, here, the testatrix has pointed to any land already in mortmain. The intention of the statute was to prevent improvident disherisons, as well as to prevent more land from coming into mortmain. If the direction was to hire land for the school, it would be equally void. But in the present case, there is an express direction to buy land; even without mentioning it, the Court must imply it, for otherwise the executors might wait to all eternity for a person to give land. To say that a testator means the execution of the charity should be kept expectant, till somebody will give land for the purpose is impossible. If such a thing can be supposed, it must be a gift within some reasonable time: but here no such thing is pointed out. The case of *The Attorney-General v. Hutchinson*, is said to be a stronger case than *Attorney-General v. Bowles*, because there was a piece of land, but where the testator does not point the land out, he is not presumed to mean it. It did not occur to any body there to argue, that the having a school was the principal intention, and that it could be carried into execution without a school-house. Would the testatrix have given the charity unless the purchase and building were to take place? An intention cannot be implied, that she meant it to be built on land to be given by another, or that the executors were at liberty to adopt any piece of land so given. Where a man gives a charity, he means it to be erected at his death, or soon after, not to wait an indefinite length of time for a gift of land. *The Attorney-General v. The Bishop*

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*Bishop of Oxford* lays it down that you must execute the testator's whole intention implicitly; *Lord Kenyon* in that case would not execute the intention *cy pres*. If the testator were to say, I give £1,000 to be laid out in a building according to an estimate, which amounted to £2,000, that would exclude the possibility of laying any part of the money out in land, but if he does not so point it out, as to exclude the idea of purchase, it must be implied. But here the intention is pointed out, for in the last clause, she empowers and directs the executors to purchase land, and it is the same thing, whether the direction is in the first, or in the last clause. What has happened in the *Downing* cause, shews that there is in this country, a manner of making lands inalienable for ever, and so there would be as to money, if it was not to be laid out at some determinable time.

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*Lord Chancellor* had, during the hearing, thrown out doubts, whether, supposing a certain sum given for the purchase, and another for the endowment, the former being void, would make the latter so likewise. At the close of the argument, he threw out some general ideas on the subject, to the following effect:

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Whether the testatrix gave land, or money to be laid out in purchase of land, either would be positively within the rules of law, and consequently void: but money given to improve *charity lands*, (1) is not a laying out in lands or devising lands. In the case of the legacy of £1,000 (*Foy v. Foy*) there was no application to land, but in the case before *Lord Bathurst* he thought it must be the intention of the testatrix that the land should flow from her as well as the other parts of the charity. But it does not strike me that this is a necessary implication. On the terms of the will, I think she did not know the statute, and that she intended part of the fund, if necessary, to be laid out in land. But she meant principally the charity to be executed. She directed therefore the purchase in order to give it scope: but surely it would not defeat her intention, if the land came *aliunde*. But *Lord Bathurst* thought it equally her intent to give the land, from a vain-glorious motive. But if it is to be so construed by the spirit of the law, we shall go but a little way if we do not save them by a distinction, that where the principal intent is to effectuate the charity, that intent will be satisfied by the land coming *aliunde*. I cannot conceive that it would disappoint her intention if the whole land came *aliunde*. The question is, whether authority given to the executors to lay out the money in land, will bring it within the statute. If land were given, I think it clear the executors could not keep back one shilling of the bequest from the maintenance of the charity.

(1) Already in Mortmain.

His

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His Lordship, by order 24th May, 1792, allowed the demurrer (a).

(a) The earlier cases *Vaughan v. Farrer*, 2 Ves. 182. *Castril v. Baker*, cit. ib. and *The Attorney-General v. Bowles*, 2 Ves. 547. 3 Atk. 806. had determined that money might be laid out upon land, though it was not already in mortmain. The construction put by Lord Hardwicke, upon the word *erect* being, that it did not necessarily imply to build, much less a purchase of ground for building: that it might mean merely *endowment* or *foundation*. This doctrine was not, as it has been shewn in the argument, affected by Lord Northington's determination in *The Attorney-General v. Tyndall*, 1 Eden, 207. Amb. 614. that having been expressly founded on the intention of the testatrix, which would have been defeated, if any one else had been permitted to give the land. The doctrine was first altered by Lord Northington, in the case of *Pelham v. Anderson*, 2 Eden, 296. which has since been followed by the present and many other cases, by which it is established that *prima facie* the testator must be taken to mean by that word, that land shall be bought, 8 Ves. 191.

and unless he distinctly points to some land already in mortmain, the Court will understand him to mean, that an interest in land is to be purchased, and the gift is not good, 9 Ves. 544. *Attorney-General v. Hutchinson*, Amb. 751. and cit. ante, vol. i. 444. n. *Foy v. Foy*, cit. ib. S. C. 1 Cox, 163. *Attorney-General v. Bishop of Chester*, ante, vol. i. 444. *Brodie v. Duke of Chandos*, cit. ib. *Attorney-General v. Bishop of Oxford*, cit. ib. *Blandford v. Thackerell*, post, vol. iv. 394. S. C. 2 Ves. jun. 238. *Corbyn v. French*, 4 Ves. 418. *Chapman v. Brown*, 6 Ves. 404. *Attorney-General v. Parsons*, 8 Ves. 186. *Attorney-General v. Davies*, 9 Ves. 535. *Attorney-General v. Munby*, 1 Meriv. 327. but a direction to *establish* a school, has been considered valid, *Attorney-General v. Williams*, post, vol. iv. 526. And where under a bequest to *erect* a school, the testator had expressly directed that lands should not be purchased, expressing an expectation that lands would be given, the bequest was determined to be valid, *Henshaw v. Atkinson*, 3 Mad. Rep. 306.

S. C.  
2 Dick. 759.  
Lincoln's-Inn  
Hall, 12th March,  
1791.  
24th May, 1792.

Tenant in tail  
makes a mort-  
gage, with cove-  
nant for further  
assurance, and  
becomes bank-  
rupt, his assigns  
are bound by the  
covenant.

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PYE v. DAUBUZ and Another (a).

THE bill stated, that *Benjamin Nankevill*, being seised in tail of lands and tenements in *Cornwall*, but representing himself to be seised in fee, borrowed £800 of the plaintiff, on the security thereof, and by indentures of mortgage of 21st and 22d December, 1780, conveyed the premises to the plaintiff in fee, subject to a proviso for redemption, on payment of £800 and interest, and *Nankevill* covenanted with the plaintiff for title, and for further assurance. In June 1789, a commission of bankrupt issued against *Nankevill*, and a bargain and sale (afterwards duly enrolled), of his real estate, and an assignment of her personal estate, was made by the commissioners, to the defendants, who were chosen assignees. The bill further stated, that the whole of the principal, and a great arrear of interest remained due, besides a further sum of £200 advanced to the said *Benjamin Nankevill*, on

(a) Reg. Lib. B. 1791. fol. 289

bond,

bond, and that the plaintiff had discovered since the bankruptcy, that the said *Benjamin Nankevill* was (under the will of his father), *only tenant in tail* of the mortgaged premises, but that the *fee simple is vested, by virtue of the bargain and sale enrolled, in the defendants*. The plaintiff, therefore, by the bill insisted, that as he was entitled by virtue of the covenants, to have called upon *Nankevill*, if he had not become a bankrupt, to have suffered a recovery of the premises for making a further assurance thereof to him, that the assignees standing in his place, were bound so to do; and therefore the bill prayed an account, and that the defendants might be decreed to pay what should appear to be due, or be foreclosed.

The defendants, by their answer, admitted the facts, but submitted to the Court what interest *Benjamin*, (being tenant in tail only) conveyed to the plaintiff by the mortgage deeds, and in whom the fee-simple was now vested, or whether the plaintiff would have been entitled to have called upon *Nankevill*, (had he not become bankrupt) to suffer a recovery and make assurance, and whether the plaintiff was entitled to a conveyance from them as assignees; and further submitted to act as the Court should direct.

*Mr. Solicitor-General* and *Mr. Steel*, for the plaintiff, argued—that the assignees were bound to do all acts that the bankrupt himself, had he continued solvent, would have been bound to do, *Taylor v. Wheeler*, 2 Vern. 564. They take the estate affected by every equity with which it was affected in the hands of the bankrupt, and the plaintiff is entitled to come against the assignees for every remedy he could have against the bankrupt; and therefore the fee having become absolute in them, they were bound in the same way he would have been had he suffered a recovery which would have let in the incumbrance. *Edwards v. Applebee* (ante, vol. ii. p. 652. n.) is a case in point with the present.

*Mr. Mitford* and *Mr. Stanley*, for the defendants.—When the mortgagor is only tenant in tail, the act done by him does not bind his assignees. The act 21 Jac. 1. c. 19. § 12. vesting the fee simple in the assignees by the bargain and sale, is not for the purpose of giving the incumbrancer a better title, but merely for the benefit of the creditors; it was so determined in *Beck v. Welsh*, 1 Wils. 276. and that the bankrupt could only convey for his life, and he being dead, in that case, the mortgage was at an end. The mortgagee can only be entitled to what he could take from the bankrupt. The assignees only hold it for general creditors, not for the mortgagee. In the case before Lord *Northington*, he does appear to have decreed the assignees to join; we must admit that to be a strong case against us: but it does not appear what was said in that case. If that case prevail, it will have a strong effect as to persons taking mortgages from tenants in tail, as it would give them

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them a title (in case of bankruptcy) that the bankrupt, at the time, could not give without the concurrence of tenant for life, which under this case, he might do without (a).

*Mr. Solicitor-General* in reply.—The statute operates as a recovery (b): then the equity arises out of a different ground, the bankrupt's having agreed that the land should be charged, which agreement would bind the land in equity. The plaintiff would have had an equity against the bankrupt, to make good the title by further assurance, and his equity is the same against the assignees; and he might come here, and call upon the assignees to make it good, just as the bankrupt ought to have done. The covenant for further assurance operates in the same manner with an original covenant to make an effectual charge. It does not appear that in *Beck v. Welsh* there was any covenant for further assurance.

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*Lord Chancellor* (during the argument, and at the close of it) said—the cases appeared to be directly contradictory: that he was not aware of the case in *Wilson*, which appeared to have been determined with great deliberation, and by great judges; yet the argument in that case did not appear to him satisfactory. The Court there held the incumbrancer not to be let in: considering the statute as declaring the use of the bankrupt's estate for the benefit of all his creditors. He should have agreed with Lord *Northington* in a different construction of the statute, conceiving its object only to be, saving the expence of a recovery; and that its effect would be to let in the incumbrance, and to convey not only all that the bankrupt had conveyed, but more: therefore if the case in the Common Pleas had not been cited, he should have adopted Lord *Northington's* construction; but that Mr. *Lloyd* said, the case in the Common Pleas had been acted upon in the Exchequer, and it would be improper to let that case stand at law, and to determine otherwise in equity.

The cause at present stood over; but on the 24th *May*, 1792, his Lordship made his decree, that the defendants should redeem

(a) N. B. There is great weight in this argument, and it may be enforced by Lord *Mansfield's* reasoning in 1 Bur. 118. which is only in substance a maxim of the law, viz. that no man can by his own wrong, acquire an advantage to himself. (*Serjt. Hill.*)

(b) Qu. This is begging the question, for the real question is not how, but for whom, it operates, and suppose the commissioners were never to execute the authority given them by 21 Jac. 1. c. 19. s. 12. over intailed lands.

Qu. Whether a mortgagee could compel them? The same stat. 21 Jac. 1. c. 19. enacts, that the statute relating to bankrupts shall be construed in the most beneficial manner for creditors. N. B. In the case in 1 Wils. the bankrupt was dead, and therefore could have made no further assurance. N. B. Creditors under a commission cannot take advantage of a covenant to renew a lease or perform a special agreement, and it seems the rule should be reciprocal. (*Serjt. Hill.*)

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the mortgage; or stand foreclosed, and execute proper conveyances of the mortgaged premises, to the plaintiff and his heirs (a).

(a) The report of this case in *Dickens*, is totally erroneous, it being stated as a deposit of title deeds. There was a case which had been previously determined by Lord *Thurlow*, which closely resembles the present, *Ex parte Wills*, 2 Cox, 233. In that case the bankrupt having borrowed £400, of the petitioner, made a lease of some premises which he had already mortgaged to a third person, and assigned the rent reserved upon the lease to the

petitioner, and the assignment contained a covenant for further assurance of the rent. The lease was void, as made without the concurrence of the mortgagee. But Lord *Thurlow* directed the value of the lease to be paid to the petitioner, on the ground of the assignment, reciting the intention of the parties to make a security for the money borrowed, and of there being a covenant *for further assurance*.

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(m) DAVIDSON v. FOLEY (a).

THIS cause, which is stated upon the demurrer, vol. ii. p. 203. came to a shorter conclusion than was expected.

It is there stated, that previous to the suing out the writs of *scire facias* and *elegit*, the plaintiffs caused a memorial of their securities to be enrolled according to law. This statement, which was that of the bill, was sufficient for the purposes of that report: but, in fact, though a memorial of the bonds was enrolled, the warrants of attorney to confess judgment were not comprised in the memorial; it being supposed that the former was a full compliance with the annuity act of 17 Geo. 3. c. 13. which requires "that a memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall be granted for one or more life or lives, or for any term of years determinable upon a life or lives, shall be enrolled in the Court of Chancery," and that it was unnecessary that the warrant of attorney should be included in the memorial.

At the hearing of the cause on the 12th of July, 1791, and subsequent days, it was argued by the counsel for the defendants, that for want of the warrant of attorney being recited in the memorial, it was defective; and the defect fatal, for that the warrant of attorney was an assurance within the act of parliament.

It stood over, in order that the plaintiffs might bring an ejectment to try this point, which however was not done: and the matter was brought on again in Hilary Vacation 1792, when Mr. Solicitor-General and Mr. Mitford, Mr. Grant, and Mr. Alexander, for the plaintiff, argued two points—That it was not necessary

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The warrant of attorney to confess judgment is an assurance within the Annuity Act, 17 Geo. 3. and therefore if the memorial enrolled under the act does not recite it the memorial and all subsequent proceedings are void.

After the bill filed, the cause shall not stand over to enrol a new memorial.

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(m) *Duke of Bolton v. Williams and Others*, post, vol. iv. 297, and 2 Ves. jnn. 138. *Wuth v. Mellard and Another*, 5 T. R. 598. *Hammond v. Foster*, 5 T. R. 635.

(a) Reg. Lib. A. 1791. fol. 610.

a memorial

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a memorial of the warrant of attorney should be enrolled—That, if it was necessary, that the cause might stand over, and a new memorial be enrolled comprising the warrant of attorney. The arguments were very long, but the substance of them were as follows:

The act (§ 3d.) requires, “that every deed or instrument, by which any annuity is *granted*, shall be enrolled within twenty days;” all therefore that is required to be enrolled, is the instrument by which the annuity is granted. But the warrant of attorney to confess judgment, cannot be said to be the instrument by which the annuity is granted. It does not operate as a grant, it does not modify it, the grant is complete without it: its only operation is to prevent the necessity of an adverse proceeding previous to the entering up the judgment; it is therefore not within the words of the act. It is impossible to conceive it to have been within the intent of the person who drew the clause in the act: where the bond is the instrument by which the annuity is granted, an instrument that only enables persons to enter up judgment on that bond, could not be intended to be included. Where acts of parliament refer to instruments, they refer to them by their known names; but the warrant of attorney is not among the instruments enumerated in the third section of the acts, “Bond, Instrument, or Assurance.” It is the duty of the legislature to speak of instruments according to their nature: but they could not mean to include the warrant of attorney; as they refer to instruments specifying the consideration, which, though the bond does, the warrant of attorney does not, further than as it refers to the bond. It refers to instruments that contain the names of the parties, for all the parties’ names are to be specified; but all the attornies of the Court are parties to the warrant of attorney. If it is necessary to enrol this, it would be necessary to enrol many things which could not be intended to be enrolled. Suppose a fine was necessary to make good the title, or a recovery, must the memorial recite the fine or recovery? But, in fact, in the present case, even if the warrant of attorney was necessary to be enrolled in annuities granted now, this would operate as an *ex post facto* law, the present grants being previous to the passing of the act, which could not be intended to affect subsisting titles. The judgment here, not the memorial, is the ground on which the plaintiffs come. It is not the memorial that entitles the plaintiff to have the obstacles removed.—But, suppose a memorial necessary, and also that it is necessary that the memorial should comprise the warrant of attorney, we may enrol a new memorial and introduce it there. There are many cases in which the Court will let causes stand over, for the purpose of doing acts which are necessary in order to the plaintiff’s remedy, where he has a right to it. Something analogous to this, was done in *Curtis v. Curtis*, (ante, vol. ii. p. 620.) where, in a bill for dower, the defendant in his answer, said, the plaintiff was never

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never married, and that there were no lands of which she was dowable. At the hearing of the cause, the *Lord Chancellor* retained the bill for a year, to give the plaintiff an opportunity of trying her right. Upon a writ of dower brought by the plaintiff, a writ went to the Bishop to try the marriage, who certified that the plaintiff was lawfully married: and on the second plea as to the husband's seisin, the widow had a verdict. She died, and upon a bill of revivor, the question was, whether her representatives had a right to an account; and decreed that they had. This, in principle, is a case similar to the present. The present is a bill to clear the way to a legal right, and the Court ought to make such a decree as will make way for the execution of the judgment. Something of the same sort was done in *Stephens v. Olive*, (ante, vol. ii. p. 90.) there, after the bill filed to try the validity of a voluntary settlement, the cause stood over for the purpose of the plaintiff's suing out an *elegit*; an *elegit* was accordingly sued out, and returned *nihil*. There, when the cause first came on, the plaintiff had not sued out his *elegit*, and had not entitled himself to recover. So in *Dormer v. Fortescue*, 3 Atk. 124. at the time of the bill filed, the plaintiff had not a right to recover; he was obliged to come to this Court to remove terms, and produce the settlement. These cases shew that the Court will let causes stand over, in order that the plaintiff may try his right at law; and not put him to file a new bill. So, where a party has got a wrong administration, the Court will permit him to take out a right one; though he had no title to recover at the time of the bill filed. So, where a clergyman sues in the Exchequer for tithes before induction, though he has no title till induction, yet, as induction will give him a title from the vacancy, the Court would let the cause stand over for him to obtain induction. So, though no tithes were due at the time of filing the bill, they would give an account of tithes due at the decree, though, in either of those cases, he had no title whatsoever at the time of the bill filed. The distinction is, that when the plaintiff has such an interest as enables him to come into this Court, they will enable him to effectuate his legal right. Here, the plaintiffs had sufficient interest, as judgment creditors, to be put into such a situation, by having the terms removed out of their way, as would enable them to get execution. So, in a bill for specific performance of a contract to purchase an estate, it is sufficient if the vendor have a complete title at the time of the decree, though he had not at the time of the bill filed. If a bill was filed for performance of an agreement, and at the time of the cause being heard, the agreement was not stamped, the Court would let the cause stand over, to get it stamped, although the act requires that agreements shall be stamped within twenty-one days, and that time should have expired before the hearing of the cause, and of course the plaintiff, at the time of filing the bill, had no title. On these grounds the plaintiffs have established a right

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right to an immediate decree; or to have the cause stand over that they may have a new memorial enrolled, upon which they may afterwards proceed to execution. The only question is, whether they shall be sent to enrol such memorial, and then file a new bill, upon which they must have the same remedy that they seek by the present bill.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Richards*, for the defendants.—There being no such memorial as the act requires, the suit must fail: without such memorial, the inquisition and *elegit* are gone. The bill is brought on the ground of removing legal impediments from their executing their judgment at law; then it must suppose that they have judgment at law, otherwise the whole must fail. The bill recites, that the defendants gave bonds and warrants of attorney to secure the payment of the annuities; and that the plaintiffs caused their *securities* to be enrolled: the fair sense of the words is, that the warrants of attorney, as well as the bonds, were enrolled: so that the whole foundation of the bill is disproved, for their being no legal memorial, there was no judgment, no *scire facias*, no *elegit*: Therefore it is not as a case of irregularity, but they were in a situation that they could not obtain an *elegit*: and the removing terms out of their way, would be to no purpose, as, by positive law, they can have no judgment. It is not like a cause standing over to bring parties before the Court, who, when there, will have a right to sue; or to try rights at law, which, when established, will give the plaintiffs a right to a remedy here; but the question is, whether a party who cannot have an execution at law, can maintain a suit here? The word *action*, in the act of parliament, must extend to every court of equity, as well as law. All the cases, as to the right of suing, have the phrase *equitas sequitur legem*; then, if a person, from any defect of title, cannot maintain his suit at law, can he have it in equity? Can an alien, or a Roman Catholic *recusant*, who cannot bring an action, file a bill? The legislature meant the annuitant should not proceed any where, without enrolling the security. If there had been no memorial, a plea of that would have been sufficient. Then there being a memorial that was illegal, cannot put them in a better situation.

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A cause was never ordered to stand over for the purpose of enabling a party who had no right at the filing of the bill, to comply with legal requisites which he had not complied with before the bill filed. There is no case of the Exchequer permitting a tithe cause to stand over that the plaintiff might be inducted. Suppose, in the present case, they had come here with a warrant of attorney on which they had never entered up the judgment, could it have stood over for the purpose of their entering it up? They might just as well come without a judgment, as without a memorial. There is no case in the books, that a judgment creditor can come here

here to have impediments removed out of the way of his execution before he has sued out execution at law. He must shew that he has gone as far at law as possible, before he filed his bill here. The case in *Atkyns (Dormer v. Fortescue)*, does not touch, in the slightest degree, upon the present case. Suppose them now to enrol a new memorial, how could they bring it upon the records of the Court? They could not bring it on by amendment. It would be absurd to bring matter into the suit by amendment which was contradictory to the claim made in their original bill. Then the only method would be by supplemental bill; but the same objection applies; the matter would not be supplemental, because contradictory; and supplemental matter must always be consistent with that which goes before. A totally new case cannot be introduced by a supplemental bill. The foundation here is gone, the bill being filed by persons as judgment creditors, who have no judgment.

Lord Chancellor, (during the argument, and at the close of it) expressed great doubt as to both the points. He seemed to think, that whatever made part of the security, must be comprised in the memorial; and that, as the judgment must be founded on the warrant of attorney, the warrant of attorney ought to appear; as, otherwise, the Court could not gather that there was a warrant of attorney to support the judgment. He said, all he could gather from the cases was, that where the Court could see there was a good judgment, it would not stop without aiding that title by what is called an equitable *elegit*, but he could not carry it higher than that; that the *equitas sequens legem* must be such as to assure the Court that the case was such as it could be followed by a legal execution, but that where it appeared that the judgment could not be followed by a legal *elegit*, the Court could not follow it by an equitable *elegit*. That, in this case, he considered the memorial as necessary to the judgment, and that if he was satisfied that the warrant of attorney was not an assurance, yet he should not be justified in determining so contrary to the opinion of a court of law, which, in the case of *Hodges v. Money*, in last *Hilary* Term, (reported in 4 T. R. 500.) had only held, that where the consideration was expressed in the bond, it need not be so in the warrant of attorney, but must be taken to have held that the warrant of attorney was an assurance, as otherwise, they would have contradicted the third section of the act.

He expressed more doubt on the second point, whether he should not now permit the parties to enrol the securities, and by amending the bill, bring the matter upon the record. He agreed, that as the matter now stood, it amounted to a nonsuit; but as, supposing a proper memorial enrolled, the plaintiff's title would be perfect, he doubted whether he should not admit them to supply circumstances ancillary to the relief sought, or should put them to the filing a new bill. In the cases put, nothing new appeared upon

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upon the record. In that of a specific performance, if the party was able to make a title at the time of the decree, the time did not appear when he became able so to do. So, in the case of an unstamped instrument, it was only hearing the cause one day instead of another, and the instrument at the hearing would be stamped. It was the same in the case of the administration. This would be like the case of the stamp, if the stamp bore a date upon it, because then it would appear upon the record that it was subsequent to the filing of the bill. His Lordship said, if the cause stood over for the purpose of enrolling the memorial, he did not see how it could be brought on the record but by a supplemental bill (a).

But, on the 24th of *May*, 1792, his Lordship made his decree in these terms, "declare that the plaintiffs not having registered proper memorials before they filed their bill, let the bill be dismissed out of this Court without costs against *Edward Foley* and *Lord Foley*, and against the other defendants with costs to be taxed *." (b)

* In a case of *Sherson v. Oxlade*, 26th June, 1792, the Court of King's Bench expressly treated the warrant of attorney as a security within the act. Vide 4 T. R. 824.

(a) Vide, as to this, *Milner v. Lord Harwood*, 17 Ves. 144. *Knight v. Matthews*, 1 Mad. Rep. 566.

collected in the Editor's note to the *Duke of Bolton v. Williams*, post, vol. iv. 297.

(b) The cases upon this subject are

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In Court,
Easter Term,
24th *May*, 1792.

A contract that the one party shall convey an estate, and the other shall grant an annuity, shall be carried into execution, though the vendor died previous to any payment of the annuity, (one having accrued due, and having been tendered.)

A memorial of such contract need not be enrolled under the annuity act, 17 Geo. 3.

JACKSON v. LEVER and Others.

THE bill stated that Sir *Ashton Lever*, Knight, deceased, being seised in fee of considerable real estates in *Lancashire*, subject to a mortgage of £10,000, and other incumbrances, caused several parts thereof to be advertised for sale by public auction, in order to discharge such incumbrances; and several parts thereof were sold to various persons, some for money considerations, and others in consideration of annuities to be granted by the respective purchasers to the said Sir *Ashton Lever* for his life.

That the plaintiff became the purchaser of certain messuages lying at *Middleton*, then in the possession of himself and of the widow *Bamford*, in consideration of an annuity of £280 a year; and a contract was entered into, bearing date *July* 27th, 1787, whereby Sir *Ashton* agreed to convey the fee-simple and inheritance of the premises therein described, to the plaintiff, his heirs and assigns; he and they yielding and paying to the said Sir *Ashton*, and his assigns, an annuity or clear yearly rent of £280, payable quarterly at the usual days, the first payment to be made on the 25th

25th of *December* then next. The premises were sold subject to a lease, *Sir Ashton* to have the rents till *Michaelmas* then next. And it was provided *that in case Sir Ashton Lever should happen to die before the 29th day of September then next, the contract should be absolutely void*, and *Sir Ashton's* heirs not bound to convey the premises. And the plaintiff further agreed, that for securing the said sum of £280 a year, the said premises should be conveyed to such trustee, and in such manner, as the counsel or attorney of *Sir Ashton* should advise; and, that as a further security, the plaintiff would procure and give *good and sufficient landed security*, to the satisfaction of *Sir Ashton's* counsel, for the payment of the said annuity of £280 to the said *Sir Ashton*; in which securities, all such powers and remedies should be comprised for recovery by *Sir Ashton Lever*, as his counsel should advise.

A short time after entering into the contract, plaintiff delivered to the defendant *Milne*, who was the agent of *Sir Ashton Lever*, the title deeds and other particulars of certain estates whereof the plaintiff was seised, which, together with the purchased premises, were intended to be made a security for the annuity of £280, and the defendant *Milne* having examined into the title, &c. of the said estates, declared himself satisfied with the security, and promised to prepare the conveyances for carrying the contract into execution.

Sir Ashton Lever survived the 29th of *September* ensuing the date of the contract, but in consequence of some delays, the defendant *Milne*, did not prepare the conveyances before the 25th *December*, 1787. On or about the 29th of the same month, plaintiff waited on the defendant *Milne*, and offered to pay him, on behalf of *Sir Ashton Lever*, the quarter's annuity which had then become due, but he declined receiving the same, saying that the conveyance would be very soon completed, and that it was not necessary for him to make such payment in the mean time, nor would the defendant *Milne* receive any money from any of the annuity purchasers, until the conveyances were ready.

The defendant *Milne* afterwards prepared the conveyances, and sent them to *London*, to be settled by counsel, from whence he received them, on the evening of the first of *February*, 1788; but on that day, *Sir Ashton Lever* died, after a sudden and short illness of only two days, so that none of the conveyances were or could be executed by him.

Sir Ashton Lever left the defendant *John Lever*, his heir at law, and in his life-time had made a will and codicil, whereby the defendants *Bamford* and *Milne* were appointed his executors, and others of the defendants claimed different interests; in particular he devised real and personal estates to the defendants *Bamford* and *Milne*, by sale or mortgage, to raise such sums as would pay his debts, legacies, &c. without the aid of his personal estate, which was not to be disposed of till the death of his wife.

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The plaintiff, by the bill, charged that the contract was fair and advantageous to Sir *Ashton Lever*, had he lived, and that he had declared himself satisfied therewith, and that he had often declared himself fully determined to perform the same as soon as he should be enabled so to do, by having redeemed the mortgage of £10,000: that the death of Sir *Ashton Lever*, at any time after the 29th of September, 1787, was not an event provided for or guarded against by the terms of the contract, or in contemplation of the parties, at the time of entering into the same, nor was there any probability of that event happening so soon afterwards as it did; on the contrary, Sir *Ashton* then was, and continued till within a few days of his death, in good health and spirits, and likely to live for several years; and that the offer to pay the first quarterly payment of the annuity, and the delivery of the title deeds of plaintiffs' estates, ought to be taken as a part performance of the said contract on his part, being all that was incumbent on him to do previous to the final completion thereof, and therefore he insisted he was entitled, in a court of equity, against the devisees in trust of Sir *Ashton*, in the same manner as he would have been against Sir *Ashton* himself, if still living.

The bill therefore prayed a specific performance of the contract, and that proper parties might be decreed to join in conveyances of the premises to the plaintiff.

The material defendants admitted the facts, to which they did not impute any fraud; they admitted that Sir *Ashton Lever* was satisfied with the contract, and the probability that he might have lived several years; but said his constitution was much broken by several severe illnesses; and submitted, as he died before the contract was completed, whether it ought to be specifically performed, and the plaintiff ought or ought not to have the conveyance, as prayed by the bill.

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There was evidence, on the part of the plaintiffs, of frequent conversations of the witnesses with Sir *Ashton Lever*, and of his satisfaction in the bargain; that the annual value of the estate contracted to be sold to the plaintiffs, was under £40 a year; and of the general state of Sir *Ashton Lever's* health; that though he had had the gout in his stomach once or twice, he was in general in good health and spirits, and died of an illness of not above two or three days; he dying on *Friday*, 1st *February*, 1788, and the witnesses speaking to his being well, holding the conversations above stated on the *Monday* and *Tuesday* preceding, and inviting the witnesses to dine with him on the *Friday* following, when he expected the contracts to be executed; and the defendant *Milne* particularly swore to the particulars of the transaction with plaintiff, that the rent of the premises in the possession of the widow *Bamford* was £13, and of those in possession of plaintiffs £22. 11s. 6d. *per annum*, that the premises in possession of plaintiff might have been purchased for £840 in money, being the price or value fixed

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on the same by persons employed for that purpose: that the premises in the possession of the widow *Bamford*, might have been purchased for £850 in money, subject to the leases granted thereof, that being the price fixed for the same. He likewise deposed to the plaintiff's deposit of title deeds, relating to the lands and buildings belonging to the plaintiff, which he approved on the part of *Sir Ashton Lever*; the offer to pay the quarter's annuity; that he prepared a conveyance to another of the annuity purchasers, and sent the same to *London*, to be perused by *Mr. Sidebotham*, which draft, together with a draft of a memorial of the grant of the annuity, to be registered, were received back by the witness, the evening before the day of the death of *Sir Ashton*; and the conveyance to the plaintiff, and grant of annuity and memorial, were intended to have been engrossed agreeable to the draft, altering names and circumstances; that one reason for the delay in the completion of the contract, was owing to a purchaser of a part of *Sir Ashton Lever's* other estate, not paying his purchase money pursuant to his contract, which prevented *Sir Ashton Lever* from discharging a mortgage affecting the premises; and another reason, the witnesses not receiving the draft till the time mentioned.

The defendant's witnesses, generally, and particularly a physician and apothecary, swore to his constitution, though naturally robust, being much broken, through various means; and that his life at the time of the contract was very precarious, he being frequently subject to attacks of the gout; and his sudden death occasioned by an apoplectic and paralytic stroke, to which he must have been long incident. The persons who valued the estates swore to the respective values of *Bamford's* (under these circumstances) to be then worth £855. 5s. and plaintiffs to be £793. 2s.

The cause was heard *Easter Term 1792*.

Mr. Solicitor-General, *Mr. Mansfield*, and *Mr. Brown*, for the plaintiff.—The cases which apply to the present are *Mortimer v. Capper*, (ante, vol. i. p. 156.) and *Pope v. Roots*, (7 Bro. P. C. 184.) Neither of them have the circumstance of the parties having contracted that the whole should be void, if the seller should not live till *Michaelmas*. In *Mortimer v. Capper*, the contract was fair, and could not be affected by the sudden death of *Capper*. An enquiry was directed as to the value of the estate, and of an annuity for the life of *Capper*, but the parties were so well satisfied with the opinion of the Court, that they never brought it back for further directions. The reference to the Master, however, shews what the opinion of the Court was: but in the present case, the parties having agreed that if the grantee of the annuity should not live to a certain day the bargain should be at an end, was bargaining that if he did live it should be carried into execution. In the

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case of *Pope v. Roots*, there is this difference, the first quarter's annuity there had not been paid; in the present case it had been tendered, which is equivalent to payment; the reason of the refusal was, that Sir *Ashton Lever*'s agent had not done what was his duty to do. Sir *Ashton* had the annuity as long as he lived, and might have probably had it for many years. In the case of *Carter v. Carter*, For. 271, *A.* devised £8,000 to be laid out in land, and settled to the use of *B.* in tail, remainder to *C.* in fee, *B.* and *C.* agreed by articles to divide the money in the manner there mentioned; *B.* the tenant in tail died without issue, soon after the making the articles, and before any division of the money; *C.* insisted that it would be a hardship upon him, that *B.*'s executor should have any part of the money: but the Court decreed that the articles should be performed and the money divided. That case must have been otherwise decided if the contingency having taken place, had been material to the case. In the present case, every thing was complete when the contract was made; there is no doubt but that immediately *Jackson* was entitled to the estate, and could have contracted for the sale of it, and Sir *Ashton* was in the same manner entitled to, and might have sold the annuity: so that the whole was legally executed before the death of the party, and it cannot be material how long he lived, whether a quarter, half a year, or a year. In all those events, the bargain would have been unequal, but the right of parties cannot depend on the equality of the consideration to the eventual value; and as either party might have compelled the specific performance of the contract, it ought now to be specifically performed, notwithstanding the death of Sir *Ashton Lever*.

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An objection has been started (by Mr. *Attorney-General*) that the annuity should have been registered, but here it is reserved as a rent, and was to be secured upon other premises besides those that were to be conveyed by Sir *Ashton Lever*, and therefore, as remaining in covenant, it could not possibly be registered. And it appears the agent for Sir *Ashton Lever* had approved of the securities offered, which, being covenanted to be good and sufficient landed securities, must have been land to the annual amount of the annuity, and therefore not within the act of parliament.

Mr. *Attorney-General*, Mr. *Mitford*, and Mr. *Stanley*, for the defendants.—There are two questions, the first arising upon the accident which has happened, the second, whether this contract for the grant of the annuity ought not to have been enrolled. And first, as to the second question, the contract was, that Sir *Ashton Lever* should convey an estate of about the value of £40 a year, and that *Jackson* should grant him an annuity of £280 secured on the lands to be conveyed by Sir *Ashton*, and should convey other lands to trustees, as an additional security, the covenant was, that he

he should "procure and give good and sufficient landed security," but what that security was does not specifically appear; we argue that this contract was within the Annuity Act, and was not within the exception contained in it. The words of the act are "that a memorial of every deed, bond, judgment, or other assurance, whereby any annuity or rent-charge shall be granted for one or more life or lives, or for any term of years determinable on life or lives, shall be enrolled in the Court of Chancery," the exception is, "that nothing in the act shall extend to an annuity secured on lands of equal or greater annual value, whereof the grantor shall be seised in fee-simple or fee-tail, in possession, at the time of the grant." Here the plaintiff appears manifestly not to be seised of the land; the contract being, that he shall "procure and give," so that it might be land to be purchased or borrowed to make the security, the words also are "good and sufficient landed security." These words are not sufficiently certain, because the exception is of land of which the grantor is seised in fee-simple or fee-tail, and "sufficient landed security" might be any of which Sir *Ashton Lever's* agents might approve; it might be of a leasehold for a long term of years, which would not be within the exception in the act, and yet might be a very sufficient security for an annuity for Sir *Ashton Lever's* life. There is no instrument in this case that we can look to but the contract, if that is defective, by the policy of the act it is void. The contract should have stipulated, that the security was lands of which *Jackson* was seised in fee-simple or fee-tail; the act meant that the security should be specified, in order that every body might see that it was sufficient. But though not within the exception, it is certainly within the act, for it is an agreement to pay Sir *Ashton Lever* an annuity, and it is an engagement equivalent to a grant of an annuity; every grant of an annuity under the act, must be enrolled; and therefore in a case of *Crossley v. Arkwright*, 2 T. R. 603, a deed by which a farm and several other things were conveyed, for considerations, one of which was an annuity, not being enrolled, was declared to be void; and here, there being a contract to pay an annuity, though only an equitable grant, it is void for want of a memorial being enrolled, as it is such a contract, that an action would lie upon it for the annuity.

Then, with respect to the events which have happened; if there is no grant of the annuity, there is no consideration for the conveyance, and the death of Sir *Ashton Lever* before the contract completed, has put an end to the whole transaction. The real meaning of the parties was, that the whole should be in suspense till the conveyances should be completed; this appears from Sir *Ashton Lever's* agent refusing to receive the quarter's annuity. We accede to the idea that the annuity was to have its commencement from *Michaelmas*, and that the first payment was to be on the 25th of *December*. But the parties all looked forward to a further

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further act to be done. Sir *Ashton Lever* could not intend to part with his estate on the payment of a single quarter's annuity, without a security for the future payments; he must have looked to the security being completed. He could not have called upon the plaintiff for payment of the annuity till he had completed his conveyances, nor could he be compelled to convey till he had a security for the annuity; therefore an event having taken place, which prevents the completion, the transaction is at an end. Then the plaintiff comes to claim that for which he has not given, and cannot give, as the case stands, any consideration; he comes on the footing of a grant which cannot now be made; that is the ground of the case of *Pope v. Roots*.

Mr. *Solicitor-General*, in reply.—The contract was complete by the execution of the deed. A contract of this sort to sell an estate, would be sufficient to revoke a testator's will, and his death could not set it up again. The nature of the property was altered by it; between the period of the contract and the death of Sir *Ashton Lever*, had he been indebted, and a writ of *elegit* had been sued out against the estate, the plaintiff might have insisted that Sir *Ashton* held it only as a trustee for him. It is contended, that it is a case of hardship upon Sir *Ashton*; I say it is not so. Sir *Ashton* had all the benefit he contracted for: he bought an annuity; he knew in its own nature it must be contingent; he considered the annuity as being worth the estate. It is said, under the act, there can be no consideration; but as soon as the security was approved by the agents of Sir *Ashton Lever*, the plaintiff's estate was bound, and he could not have cleared it from Sir *Ashton Lever's* charge. Then as to the annuity act, the plaintiff here does not come for an annuity, but for an estate: if the contract required registering, it was Sir *Ashton's* business to register it. It is the grantor's duty to register the deed. If he had come for payment of the annuity, and the plaintiff had set up the defect of that register, the Court might perhaps say, that from that defect he could not recover: but although the courts of law have said, that the grantor of an annuity, making the objection that there was no memorial enrolled, shall not hold the consideration: the Court can never take notice of the defect of registration, at the instance of him who ought to register. Here Sir *Ashton Lever* could not have refused to accept the annuity on the ground of non-registration. What is the justice of the case? If it was Sir *Ashton Lever's* intention to exchange his property for an annuity, he was satisfied with the consideration. It was not the intention of the annuity act to cut down fair transactions. This is not a deed, bond, or instrument for securing an annuity, within the sense of the first clause of the act. It is an agreement that an estate shall be conveyed, and an annuity shall be secured. It is not within the sense of the clause, as it looks to a future act. In the case of infants,

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infants, the word "contracts" is contained in the act: but with respect to adults, that word is omitted. The act contains severe penal clauses: suppose this had been within them, could a party have been convicted on such a contract as this? It is only a contract on which a court of equity may compel the grant of an annuity: this could not be contended to be within the penal clauses. What did the legislature mean? It clearly did not mean to include contracts in the first clause. This is not an instrument for granting or securing an annuity; but a contract that a party will make a future grant; and refers to more complete instruments to be made. It not being under seal, the covenantee could not bring an action for not executing a grant, upon having one tendered for that purpose. It is not necessary to register such a contract, in order to have a specific performance of it; though he must have registered that future deed, in order to have brought an action upon it. But upon the previous contract, the remedy is different. With respect to the exception in the act, the covenant to give landed security is equivalent to a covenant to convey land of which he is seised in fee-simple. Under the covenant, Sir *Ashton Lever* would have a right to such security; leasehold estate would not do; Sir *Ashton Lever* would not be bound to take it; for there might be a covenant with the lessor to which the Court would not make the annuitant liable. There is no decision of any court, by which the party would be obliged to take leasehold estate as a security. In *Crossley v. Arkwright*, it was held, that the grantor setting up the annuity act as a defence, should repay the consideration money; but that is very different from saying, that Sir *Ashton Lever* can take the benefit of the defect, when it is his duty to register it. This reduces it to the question, whether that has been done in this case, which has been required in other cases. The act was so far complete on our side, that they might have called upon us to pay the annuity or be foreclosed. But something remained to be done on both sides; that to be done on their part, is to convey the estate.

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Lord Chancellor said—there were two questions, first, was this, in form, a grant of an annuity, or only a covenant to make a future grant? and if it was only a covenant to make such future grant, whether it was within the act (a). As to the rest, I do not see if an annuity was contracted for, why the consideration should not be paid. It is objected, the contract cannot be carried into execution *modo et forma*; that has great weight where there has been no payment. But suppose a suit had been commenced for payment of the annuity, would a death *pendente lite* have made a difference? I have not considered the cases on this point sufficiently to decide this.

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(a) As to this, vide *Crespigny v. Wittenoom*, 4 T. R. 790, and *Brown v. Deathwaite*, 1 Mad. Rep. 446. As to

the general doctrine upon the subject, vide the Editor's note to the *Duke of Bolton v. Williams*, post, vol. iv. 297.

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The cause stood over, and upon the 24th of *May*, Lord Chancellor made his decree, whereby he declared that the contract, dated the 27th of *July*, 1787, between Sir *Ashton Lever* deceased, and the plaintiff, ought to be carried specifically into execution; and decreed the same accordingly, and gave the necessary directions for that purpose; and for an account and payment of the arrears of the annuity of £280, the consideration for the purchase of the estate (a).

(a) This case has been repeatedly recognized and approved of, the principle being, as observed by Lord Eldon, that the party has the thing he bought, though no payment may have been made, for he bought subject to a contingency, 6 Ves. 352. and therefore, on the other hand, if the premises are deteriorated by fire or other accident, before the completion of a contract, the purchaser is bound, *Paine v. Meller*, 6 Ves. 349. *Coles v. Trecothick*, 9 Ves. 346. *Ex parte Minor*, 11 Ves. 559. *Harford v. Purrier*, 1 Mad. Rep. 532. *Akhurst v. Johnson*, 1 Swanst. 85. *Revell v. Hus-*

sey, 2 Ba. & Bea. 287. et vide Sugd. Vend. & Purch. 235. for if by the contract he has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his, they may be devised as his, they may be assets, and they would descend to his heir, 6 Ves. 352. A purchase before the Master is not complete before confirmation of the report, and therefore a loss by fire after the report, but before confirmation, falls upon the vendor, *Ex parte Minor*, cit. sup. *Twigg v. Fifield*, 13 Ves. 517.

Rolls,
24th May.

Specific performance decreed of articles of separation at the suit of the wife, though the husband offered, by his answer, to receive her again.

GUTH v. GUTH (a).

THIS was a bill filed by *Catherine Lysette Louisa Guth*, by her next friend, against her husband *John* alias *John James Philip Guth*, praying that an account might be taken of what was due to her in respect of the arrears of an annuity of £100 agreed to be paid to her by her husband, in pursuance of a deed poll of separation therein recited, and that he might pay the same to her use, as well as the growing payments thereof, as they should from time to time become due.

The bill stated, that the plaintiff and defendant being natives of *Germany*, several years ago intermarried together, but that unhappy differences having arisen between them, it was mutually agreed that they should live separate and apart from each other; and accordingly a deed poll of agreement, bearing date the 26th of *October*, 1715, was signed and executed by the defendant for that purpose; whereby, after reciting "that they had mutually agreed and consented to *live separate and apart from each other from that day*; and that the plaintiff had agreed and consented on *that same day*, to go immediately out of the realm of these kingdoms into foreign parts beyond the sea; and had promised not to molest him the defendant in *any manner whatsoever, nor to*

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(a) Reg. Lib. A. 1791. fol. 305.

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return into these kingdoms without the said defendant's consent, in writing, to that purpose previously had and obtained, and signed by two witnesses; provided that the defendant should not fail, neglect, or leave undone, in any manner whatever, any of the therein named conditions and covenants by him to the plaintiff thereby made: he the said defendant agreed to allow and pay to, or cause to be paid, unto her the plaintiff, or her assigns, the sum of £100 per annum, for the full maintenance of herself and one of her children named Henry, then with her, during her natural life, and as long as they should so keep separate and apart from each other, by equal quarterly payments, to commence from that day; provided that the plaintiff should conform to the several before mentioned conditions and agreements; and in case she should contract any debts without the privity and consent of the defendant, and which he should be compelled to pay, that then the agreement should be void."

That the plaintiff, with her youngest child, immediately after the execution of the agreement, went to reside abroad, and had ever since lived apart from the defendant, and had not during that time molested him:

That the annuity of £100 per annum, had been constantly remitted to the plaintiff till the 26th of October, 1789; but that from that period, she only received £10 a quarter from the defendant, who had repeatedly refused to pay up the arrears of the annuity, or to remit the growing payments thereof, in the manner stipulated by the above agreement of separation.

The defendant, by his answer, admitted the agreement of separation, but said, that in 1789, having become insolvent, he had compounded with his creditors, and paid his respective debts to the utmost of his ability, and was thereby rendered unable to pay to the plaintiff the whole of the said annuity, and that the sum of £10 a quarter was to the full extent of what he could afford to pay to plaintiff for maintenance of herself and child, and that in order to alleviate plaintiff's expence, he had offered to take home the child and maintain it himself:

That he is unable, under his present circumstances, to pay to the plaintiff any more than £40 per annum, and which he believed was sufficient for the maintenance of herself and child; but if the same should not be thought sufficient for that purpose, he was ready and willing, and submitted to relinquish the agreement, and take home the plaintiff and her child, and to maintain them with his other children, in the best manner he was able.

There was no proof, except on the part of the defendant, of his insolvency, and having compounded with his creditors; and that his personal income, arising from his business, did not amount to more than £300 per annum.

The cause came on in Trinity Term last, and was much agitated at the bar; but as the argument and cases cited, were repeated
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and commented upon by his Honour in giving judgment, it is unnecessary to state them.

His Honour, this day pronounced his decree to the following effect :

Master of the Rolls.—The first question, upon this agreement is what is the *real meaning* of it: for if it does not amount to an engagement, upon the part of the husband, to permit the plaintiff to live separate, till they mutually agree to cohabit together, this bill cannot be sustained; because he, by his answer, has offered to do so. This has been compared to the case of *Head v. Head*, (3 Atk. 547.) and said to be a *mere temporary agreement*, and not intended to be binding upon either party, provided the other was willing to cohabit again; notwithstanding it had been deliberately entered into: but the true construction is, a *total separation*, until both shall agree to cohabit. The recital in this deed, takes no notice of any *future cohabitation*: for the words purport to be a *mutual agreement* to live separate from this day; and I do not see how I can annex any other meaning to them, than that of a perpetual separation from each other, unless both parties should jointly wish to live together again. It has been contended, that the clause in this instrument, which stipulates for the payment of the annuity, must mean nothing more than a *temporary agreement*; and that the words “as long as we shall so keep separate and apart from each other,” clearly furnish that construction: now the condition was, that the plaintiff should live abroad, and take her youngest child with her; and in consideration of her so doing, he engages to pay to her, or her assigns, £100 *per annum*, so long as they shall keep so separate, she observing the condition imposed upon her, to go out of the kingdom, and not to return without his consent, or to molest him during her absence; and in case she breaks any of the above conditions, then the agreement was to be at an end; so that, according to the language of the deed, unless there was a direct violation of it on the part of the plaintiff, the defendant could not oblige her to return to him; and it may be clearly inferred from other circumstances, though not proved or disclosed in evidence, that for the future it was meant by both parties, that they should continue separate from each other, unless, in case of a breach of the conditions contained in the agreement, the one had a right to compel the other to return. Then the question is, whether, without proof of any other circumstances than that of a mutual agreement of separation between them, this Court will, upon a bill filed by the wife, compel the husband to abide by it, although he, by his answer, offers to cohabit with her, and might sue in the Ecclesiastical Court for restitution of conjugal rights. It has been suggested, that to enforce such a contract, would be an infringement upon the jurisdiction of the Spiritual Court: but that

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that court can only judge by circumstances, how far it is warranted to pronounce a compulsory sentence against the husband or wife; but with respect to the contract itself for a separation, it cannot have any right to pronounce sentence upon the agreement itself, or to take into consideration the circumstances upon which it may be founded. In such cases, where parties have been unhappy, and it has been found expedient to enter into such a deed of separation, surely it was neither necessary nor fit that a wife should proclaim to the public every circumstance which may have occasioned it; neither is it necessary for this Court to know every particular so as to enforce an execution of it. (n) There are instances where this Court has determined to enforce such contracts either with or without a disclosure of circumstances, without the parties resorting to the Ecclesiastical Court; and the rule seems to be, that as against the husband, it will enforce an agreement for a separation, upon a bill filed by the wife, though the husband has declared his readiness to take her home again; the Court will say, these are circumstances which we must not enquire into. The agreement ought to be deemed mutual, the husband ought to pay the money, and the bill is to compel him to do so. It has been said, that the husband has been compelled to enter into this engagement, and upon that ground, if he had filed his bill to be relieved against it, the contract might have been rescinded: it does not appear to be the case here, but even supposing such a contract had been obtained from him by some circumstances of coercion; if the wife had been sufficiently guarded, as in the present instance, in respect of her conduct, and observing the conditions thereby imposed upon her, it does not follow, that he is not bound by it: and surely if it binds his wife, it must bind him, as a mutual agreement; it was his contract as much as hers, and he shall not avoid it, unless he can shew a direct violation of it on the part of the plaintiff.

The cases fully establish this principle, the first of which is *Seeling v. Crawley*, 12th of November, 1700, 2 Vern. 386. Reg. Lib. p. 71. 1700. It appears from the Register's Book, that the defendant, by his answer, had offered to be reconciled to the party, or if she did not choose to return, then to allow her the £160 *per annum*; and the decree seems to rest upon the particular circumstances of the case. The next case is *Angier v. Angier*, Pre. Chan. 497. or as it is written in the Register's Book, *Engier v. Engier*, Reg. Lib. A. 6th December, 1717; a vast number of witnesses were examined; the agreement, as charged in the bill, was admitted by the answer; but it does not appear for how long they were to separate, nor are there any words purporting a *perpetual separation*; it is admitted by the evidence on both sides, that the husband and wife could not live together without the hazard

(n) See *Leyard v. Hodges*, 3 Ves. 353.

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of very bad consequences: there had also been proceedings in the Spiritual Court; the decree established the agreement, with the reasons for so doing, and directed a settlement to be made upon the wife in performance of it. That case had an ingredient in it, which this had not, for it proceeded upon a great deal of evidence of circumstances, and upon the ground that the agreement had put an end to the suit in the Ecclesiastical Court. *Lister's case*, 8 Mod. 22. Stra. 478. was a case at law, upon an *habeas corpus*, where the court refused to deliver back the wife to the husband, and there is another case of a like nature in 1 Burr. Rep. *Rex v. Mead*, 452. *Fitzer v. Fitzer*, 2 Atk. 511. was a bill brought against the husband and his creditors, and Lord Hardwicke goes upon this ground, that with respect to creditors, such an agreement being voluntary, could not prevail, though good against the husband, upon the authority of *Engier v. Engier*, and *Seeling v. Crawley*: and his Lordship observed, that if he was to enforce it, as against the creditors, it would be encouraging insolvent parties to execute such agreements, by way of avoiding payment of their debts. So in *Stephens v. Olive*, (ante, vol. ii. p. 90.) one of the points was, whether the agreement was good against creditors, and Lord Kenyon, in citing *Fitzer v. Fitzer*, observes, that it was not so in that case, because there was no *valuable consideration* on the part of the wife; but held it good in *Stephens v. Olive*, considering that the circumstance of the property being invested in trustees, and they bound to maintain the wife, rendered it a valuable consideration, so as to support it against creditors. *Head v. Head*, 1 Ves. 17. but more accurately reported in 3 Atk. 547. has been said to completely decide the present case, and establish this principle, that if the husband offers to take the wife home, the court must comply, and annul the agreement: the question was, whether the letter, which is accurately stated in Atkyns, amounted to an agreement for a perpetual separation, or merely a temporary one; and it was clear, from the language of it, that it meant only the latter; Lord Hardwicke seems to have been anxious to have enforced it, if he could have done so with propriety, and he decides the case purely upon the ground of its being a *mere temporary agreement*, and that the parties must apply to the Ecclesiastical Court: that authority cannot decide this case; as if it had been a perpetual agreement, the Court would doubtless have enforced it. *Fletcher v. Fletcher*, * November 20th, 1788, has also been

* *Fletcher v. Fletcher* (a), the plaintiff, the wife of the defendant, filed her bill against her husband and trustees for a specific performance of *articles of separation*: the defendant, the husband, filed his cross bill for the delivery up of the articles, and praying that the same might be cancelled: the plaintiff having, as proved in the cause, returned to her husband, and cohabited with him for

(a) There is a very full and satisfactory report of this case, 2 Cox, 99.

fourteen

been adverted to; the learned judge was perfectly clear, that in all cases where the contract is a proper one, this Court will enforce it, and would have done so in that instance, had there not been a subsequent cohabitation.

After these authorities, independant of any other circumstances, and without proof, the question nakedly comes before me, whether I ought not to enforce this agreement; and I am of opinion, that I am bound by the cases to do so. It has been suggested, that there are authorities where the parties, after such a contract, have applied to the Spiritual Court for a restitution of conjugal rights: and that there is the case of *Booth v. Booth*, in the latter part of Lord *Hardwicke's* time, which came before the Court upon an injunction to restrain the proceedings in the Spiritual Court; but what became of that matter I have not been able to trace: what would be the event of such an application, it is not necessary for me now to decide. The objection which remains to be considered, is, that if the Court does enforce such a contract, the peculiar situation of the defendant, as having been an insolvent man, does not warrant a specific performance of it in the present instance, at least, to its utmost extent, and that the plaintiff ought to rest satisfied with the £40 *per annum*. But I am of opinion, that if it is performed, it must be so *in toto*, and that it cannot be executed only in part. This is the contract of the husband to maintain the child as well as the wife, and he must abide by it; and so long as she complies with the conditions of it and keeps the child, she must receive the £100 *per annum*: therefore, let it be referred to the Master to take an account of what is due for the arrears of the annuity from the date of the receipt, and let the same be paid, together with the growing payments to her, or such person as she shall appoint, and the defendant to pay the costs (a).

fourteen days, and there being some other strong collateral circumstances in evidence, in favour of the defendant:

Mr. Justice *Buller*, sitting for Lord Chancellor, refused to decree a performance, and dismissed the original bill; and upon the cross bill, ordered the deed to be delivered up; no costs on either side.

(a) The present, as observed by Lord *Eldon*, 11 Ves. 532, is the only case in which such a contract has actually been enforced, and though it has been taken for granted, in some cases, (*Lord Rodney v. Chambers*, 2 East, 283. *Hobbs v. Hull*, 1 Cox, 445. *Fletcher v. Fletcher*, 2 Cox, 99.) that a Court of equity has jurisdiction to decree the specific performance of articles between husband and wife for a separation and separate maintenance, that doctrine has now been abandoned, (vide the cases cit. *infra*) it being impossible, as against the

wife, to hold them good either in law or equity; as she cannot, while under coverture, execute any deed whatever. Upon this principle the cases of *Ringstead v. Lady Lanesborough*, Co. B. L.; *Corbet v. Poelnitz*, 1 T. R. 5. and *Barwell v. Brooks*, cit. ib. in which it had been determined, that a feme covert living apart and having a separate maintenance, might contract and be sued as a feme sole, after having been repeatedly doubted, *Hatchett v. Baddeley*, 2 Bl. Rep. 1079. *Compton v. Collinson*, 1 H. Bl. 350. *Ellah v. Leigh*, 5 T. R. 679. *Hyde v. Price*, 3 Ves.

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3 Ves. 443. *Clayton v. Adams*, 6 T. R. 604. *Beard v. Webb*, 2 B. & P. 107. were finally over-ruled upon great deliberation by all the judges in *Marshall v. Rutton*, 8 T. R. 545; and that determination has been followed, *Marsh v. Hutchinson*, 2 B. & P. 226. *Boggett v. Frier*, 11 East, 301. *Kay v. Duchesse de Piennes*, 3 Campb. 122. These cases have restored the old rule of law, by which (with the well known exceptions of where the husband has abjured the realm, become professed, or is banished, Co. Lit. 133.) no married woman is capable of contracting or acting as a feme sole, or of suing or being sued as such.

But since a Court of equity, as observed by Sir W. Grant, 3 Meriv. 268. recognizes no power in the husband and wife to vary the rights and duties growing out of the marriage contract, or to effect at their pleasure, a partial dissolution of that contract; it should seem to follow, that it would not acknowledge the validity of any stipulation that is merely accessory to an agreement for separation. It has however been determined, that engagements entered into between the husband and a third party, shall be valid and binding, although they originate out of, and relate, and give efficacy to

that unauthorized state of separation on which the husband and wife have endeavoured to place themselves, *Legard v. Johnson*, 3 Ves. 352. *Lord St. John v. Lady St. John*, 11 Ves. 516. *Seagrave v. Seagrave*, 13 Ves. 459. *Worrall v. Jacob*, 3 Meriv. 236. and where a trustee refused to enforce a bond for an annuity given by a husband upon separation, the Court, upon a bill of the wife by her next friend, made a decree for the arrears and growing payments, *Cooke v. Wiggins*, 10 Ves. 191.

As in the Spiritual Court, upon a separation *a mensa et thoro propter acritiam aut adulterium*, after a reconciliation the same cause of complaint cannot be revived; so after a separation upon articles, if the parties once together again come there is a complete end of them, *Fletcher v. Fletcher*, cit. sup. *Lord St. John v. Lady St. John*, cit. sup. *Bateman v. Countess of Ross*, 1 Dow. P. C. 235.

As to a covenant from the trustees in a deed of separation to indemnify the husband against debts contracted by the wife after the separation, being a valuable consideration as against creditors, vide *Stephens v. Olive*, ante, vol. ii. 90. and the Editor's note.

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Lincoln's-Inn
Hall, 25th May.

Injunction to stay waste refused, where the plaintiff and the defendant in possession were tenants in common, but granted on affidavit of defendant's insolvency.

SMALLMAN v. ONIONS and Others (a).

MR. *Abbot* moved for an injunction to restrain the defendants from felling or cutting down any more timber or other trees, or committing further waste on the premises in the bill mentioned, upon affidavits of title, and of waste committed.

By the bill, and that part of the affidavits which went to the plaintiff's title, it appeared that *Lucius Henry Hibbins, LL.D.* being seised in fee of the premises, devised the same to his wife and two other persons, as trustees, to sell the same, and out of the money to be produced by the sale, to pay off incumbrances on the estate, then to his wife for life, and after her decease to pay certain legacies, and to divide the rest of the money into three parts, and to pay and apply them as follows, that is to say, two parts of the said three parts to his son *Frederick George* (whom he called his unhappy fugitive son,) if living, or if dead, to his children lawfully begotten, but if he be dead without lawful issue, then to such of his relations as his wife, by her last will should have appointed to receive the same on such a contingency; and for

(a) Reg. Lib. B. 1791. fol. 801.

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want of such appointment then to his niece *Lucretia*, daughter of his brother *Hibbins*; and as to the other third part of the said money, to pay the interest thereof to his daughter *Henrietta Lucretia*, for her sole and separate use, and out of the power of her husband, and after his decease, if she should happen to survive him, to pay the money to the said *Henrietta Lucretia*, her executors, &c. provided the said executors, &c. were not of the blood of her husband; and if his said wife should die before her said husband, then to pay the said three parts to such of the testator's relations, as his said wife should appoint to receive the same; and for want of such appointment, to the children of *John Onions*, share and share alike, and made his wife executrix. *Elizabeth Hibbins*, the widow of the testator, entered into possession of the estate, and made her will, dated 23d November, 1759, and thereby directed, that in case her husband's son *Frederick George* was dead without issue, the trustees should pay his two thirds to *Henrietta Lucretia*, (in certain events) remainder to *Lucretia*, daughter of the said *Lucius Hibbins*, her executors, administrators, and assigns: *Elizabeth Hibbins* died soon after the making of the will, *Henrietta Lucretia* being then dead, without issue: *Frederick George*, son of *Lucius Hibbins*, about forty years ago, went abroad, and had never returned to *England*, and therefore the deponent swore he verily believed that he was dead without issue. The plaintiffs *Robert Smallman* and *Lucretia Smallman*, are the son and daughter of *Lucretia*, the daughter of the testator, and as such entitled, in the events that have happened, to the money to arise from the sale of the premises.

The premises had not been sold, but *John Onions*, junior, who was entitled to the other third, as the son of *John Onions*, upon the event of the death of *Henrietta Lucretia*, entered, upon the death of *Elizabeth Hibbins*, into the whole of the premises, and had continued ever since in possession, without paying any rent to the plaintiffs, and plaintiff *Robert Smallman*, who made the affidavit, swore, that being informed that part of the timber had been agreed by *Onions* to be sold, he made an entry upon the premises, and then found that the timber had been sold by the defendant *Onions*, to the other defendants *Massey* and *Lewis*, whose agents were then cutting the timber.

In a further affidavit, the plaintiff *Smallman* swore, that he had applied to the defendants *Massey* and *Lewis*, that two-thirds of the purchase money of the said timber might be paid into court, to the credit of the cause, and not paid over to the defendant *Onions*; which they refused, and said, they should pay the money to the defendant *Onions*: and the plaintiff further swore, that if the purchase money for the timber so purchased by the defendants *Massey* and *Lewis*, should be paid to the said defendant *Onions*, the same will not be safe in his hands, as the deponent conceives the said *John Onions* is not of ability to answer the amount

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amount of the said two-thirds of the purchase money of the timber, and two-thirds of the rents and profits of the premises.

Lord Chancellor said—he had no idea of an injunction to stay waste in such a case as this, where the persons applying for the injunction are tenants in common with the person in possession, who has therefore an equal title to the possession with them, although they might have a partition against him : and referred to a case in 1786 (a).

Mr. *Abbot* argued—that they were only equitable tenants in common, the legal estate being in the surviving trustee; that, therefore, the person who was committing the waste has no title to the possession, and cutting the timber is a trespass upon the trustees : and the affidavit states, that the party is insolvent, and cannot pay the plaintiffs their shares of the money to be produced by the sale.

And upon this ground the *Lord Chancellor* granted the injunction (b).

(a) This alludes to the case of *Goodwyn v. Spray*, 2 Dick. 667.

(b) Applications between tenants in common, joint-tenants, and co-parceners, for injunctions, have generally been refused, *Goodwyn v. Spray*, cit. sup. unless attended by some peculiar circumstance, as the insolvency of the party in the present instance : or in cases of destruction, *Hole v. Thomas*, 7 Ves. 589. that not being the legitimate exercise of the enjoyment arising

out of the nature of the party's title to that which belonged to him and the other party, 16 Ves. 181. So where one tenant in common had become the occupying tenant of the other, Lord *Eldon* granted an injunction stating that circumstance expressly in the order, and restraining him from committing any waste upon the premises which he held as such occupying tenant, *Twort v. Twort*, 16 Ves. 128.

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TRINITY TERM,

32 GEO. III. 1792.

ELMSLIE and Others v. M'AULAY and Others.

Rolls,
11th June.

THE plaintiffs were creditors of *John Ogilvy*, who died 10th of *April*, 1788, having made his will, and appointed his widow *Jane Ogilvy*, one of the defendants, sole executrix, who had proved the same; the plaintiffs filed a bill against her, as executrix of her husband, for an account of his estate, to which she put in her answer; and the cause coming on before his Honour, it was ordered to be referred to the Master to take an account of the testator's estate, with usual directions. Before the account taken, or further order made, the plaintiffs filed the present bill against the defendants *M'Aulay*, as executor of *Patrick Ogilvy*, brother of the said *John Ogilvy*, *Jane* the widow, the other executors of the brother, and other persons interested in the distribution of his (*Patrick Ogilvy*, the brother's) estate, and the Bank, stating the former bill, and that the assets of *John Ogilvy*, possessed by the defendant, his widow, were not sufficient to satisfy his debts, and that the plaintiffs had, since the filing their bill, discovered that *Patrick Ogilvy*, the brother of *John*, had made his will, dated 24th *August*, 1782, and had thereby directed "the residue of his property to be put into the funds of the Bank security, the interest to be paid to his father, and after his decease, the money funded to be divided into three equal parts, one part thereof to be paid to his loved brother *John Ogilvy*," the other thirds to other persons who were made defendants, and appointed the defendants *M'Aulay*, *Campbel*, and his brother *John Ogilvy*, executors; that *Patrick Ogilvy* died, soon after making the will, and that *John Ogilvy* and *Campbel* proved the same, that *Campbel* had proceeded to collect certain parts of the estate of *Patrick Ogilvy* abroad, which he had remitted to the defendant *M'Aulay*, who, though he had not proved the will, had collected effects in *England*, and had received the same, together with the effects remitted by *Campbel*; the bill further stated, that the defendant *Jane* the widow of *John Ogilvy*, had refused to join the plaintiffs in this suit, or to take measures to compel the defendant *M'Aulay* to lay out the testator's property in his hands, upon the trusts of the will; and that the plaintiffs had reason to believe, that unless the property of testator *Patrick Ogilvy*, in the hands of defendants *M'Aulay* and *Campbel*, is laid out according to the directions in *Patrick Ogilvy's* will, the same would be endangered; and, as the

Creditors of *A.* cannot maintain a bill against the representatives of *B.* to a part of the residue of whose estate *A.* is entitled.

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assets of *John Ogilvy* are insufficient to pay the plaintiffs and other creditors their debts, without applying his interest under *Patrick Ogilvy's* will for that purpose, they had applied to defendant *Jane*, to require the defendant *M'Aulay* to come to an account of the property of *Patrick Ogilvy* which has come to his hands, and to request him to invest the same as directed by the testator's will, for the benefit of the persons now interested in the same, or who will become entitled to receive the same, according to their respective interests, after the decease of the defendant *Malcolm Ogilvy*, the testator's father.

The bill therefore prayed an account of the personal estate of *Patrick Ogilvy* come to the hands of the defendant *M'Aulay*, or others of the defendants, and that after payment of testator's debts, &c. the residue might be invested in some of the public funds, the interest paid to the defendant *Malcolm Ogilvy* for life, that two third parts might be declared to belong to the persons to whom the same were given by testator's will, and the remaining third part to *John Ogilvy* deceased, and that the said *John Ogilvy's* third part may be decreed toward the payment and discharge of the plaintiff's and his other creditors' just debts, &c.

The defendant *Jane Ogilvy* (widow of *John Ogilvy*) by answer, denied that she ever refused to join with the plaintiffs in this suit, or to take other measures to compel the defendant *M'Aulay*, to lay out and invest the testator *Patrick Ogilvy's* property on the trusts of his will, she never having been applied to, or requested by the plaintiffs to join them in this suit.

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At the hearing of the cause, his Honour had thrown out great doubts, whether the creditor of *A.* could maintain a bill against the possessors of the assets of *B.* in which *A.* was interested.

His Honour this day pronounced judgment.

Master of the Rolls.—My only doubt has been, whether this was a case to dismiss the bill with costs : and I think I should not do justice to the parties if I did not dismiss it *with costs*.

It is a bill by the creditors of *John Ogilvy*, against persons having assets of *Patrick Ogilvy*.

The first bill was against *Mrs. Ogilvy*, the executrix of *John Ogilvy*, for an account of his estate.—On the hearing, the usual accounts were directed.

Before any account taken, the creditors filed this bill against *Mrs. Ogilvy*, the executrix, the residuary legatees of *Patrick Ogilvy*, and other persons interested in his estate.

The question is, whether the Court will permit such a bill to be filed ? The consequence of it would be, that it would be competent to any simple creditor of *John*, to file a bill against the representatives of *Patrick* : if *John* was one of the residuary legatees of *Patrick*, so might *Patrick* be of some other estate, which the creditor of *John* might as well follow.

It

It is impossible to maintain such a bill, except in the case where there is a collusion of the executrix with the person who is possessed of the fund: that made out or proved, might support such a bill.

Here they should have made a special application, to be let in before the Master; and have desired that she might be directed to pursue the effects of *Patrick*, or that they might be permitted to use her name in a suit for that purpose.

All collusion is denied by the answer, and none is proved: then can such a bill be supported? It would be a monstrous proposition for me to lay down. She has sworn she never was called upon to pursue the effects of *Patrick* till after the bill filed.

Another objection to such a bill is, that if it were maintainable by every single creditor upon the fund, so it would be against every individual debtor to the fund; which would load the records of the Court with an infinite number of expensive suits.

Bill dismissed with costs (a).

(a) The general principle has been established by a great variety of decisions, that a debtor to the estate cannot be made a defendant to a bill by a creditor or residuary legatee against the executor, unless there be collusion, insolvency, or some special case, *Newland v. Champion*, 1 Ves. 105. *Beckley v. Dorrington*, cit. 6 Ves. 749. *Franklyn v. Ferne*, Barnard. Ch. Rep. 30. *Utterson v. Mair*, post, vol. iv. 270. 2 Ves. jun. 95. *Bowser v. Hughes*, 1 Aust. 101. *Doran v. Simpson*, 4 Ves.

651. *Troughton v. Binkes*, 6 Ves. 572. *Alsager v. Rowley*, ib. 749. *Benfield v. Solomons*, 9 Ves. 77. *Saxton v. Davis*, 18 Ves. 72. S. C. 1 Rose, 70. *Tulk v. Houlditch*, 1 Ves. & Bea. 218. In *Burroughs v. Elton*, 11 Ves. 29. a judgment creditor was permitted to sue; the circumstance of the heir and personal representative of the debtor being unable or unwilling to sue, being considered such a special case as to take it out of the general rule.

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MINOR and Others v. WICKSTEED and Others (a).

JOHAN RAVENSHAW seised of real, and possessed of some personal estate, made his will, dated 13th February, 1783, as follows, "First, I direct that all my debts and funeral expences shall be discharged by and out of my personal estate, (not herein after specifically bequeathed), also I bequeath to my loving wife *Susannah Ravenshaw*, all my provisions of household, wines, malt and other liquors, coals and fuel that shall be in or near the dwelling-house wherein I do or shall inhabit at my death, or the buildings and folds thereunto belonging, every or any of them, to be delivered to her immediately after my decease, and also the sum of twenty guineas, to be paid within one month, for her present sub-

Where there is a charge in the will of legacies upon real estate, they shall be so charged, though they are first directed to be paid out of the residue of the personalty, the personal fund proving deficient.

(a) Reg. Lib. 1791. fol. 409.

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sistence; also I give the use of all my household goods, furniture, plate, china, linen, books, and dairy vessels whatsoever, (which I exempt from the payment of my funeral expences and legacies) unto my said wife *Susannah*, for and during her natural life, and from and after her decease, then I give the use of the said goods, &c. unto my said wife's niece *Felicia Griffith*, widow, for and during her life, and after the decease of the survivor of my said wife, and the said *Felicia Griffith*, I will that the said goods, &c. shall be deemed and taken to be part of the residue of my personal estate hereinafter disposed of; also I give to my said wife's niece *Hannah Davies*, five guineas to be paid six months after my death; also I devise all my estate and interest of and in those two several pieces and parcels of land or ground lying in *Whitchurch* aforesaid, called *Edges Croft* and *The Black Lakes*, unto my said wife *Susannah Ravenshaw*, her heirs and assigns; also, I devise all and singular other my messuages, tenements, lands, hereditaments, and real estates whatsoever, with their appurtenances, unto my said wife *Susannah Ravenshaw*, and her assigns, for and during the term of her natural life; remainder to *Felicia Griffith* for life; and from and immediately after her decease, then I devise all the said last hereinbefore mentioned messuages, lands, tenements, hereditaments, and real estates, with their appurtenances, *subject to, and charged and chargeable with the payment of such of my debts, funeral expences, and legacies, as that part of my personal estate, which is herein made liable thereto shall not reach to pay*, unto *John Wicksteed*, of *Whitchurch* aforesaid, surgeon, his heirs and assigns for ever: also, I give to my sister *Mary Allen*, the weekly sum of 2s. 6d. from my death for the term of her natural life, the first payment thereof to be made at the end of seven days next after my death; and I do charge my personal estate with the payment thereof accordingly; also, I will, order, and direct, that the said *John Wicksteed* and *William Minor*, my executors, hereinafter named, do and shall, from time to time, after my death, for and during the natural lives of my said wife, and the said *Felicia Griffith*, and the natural life of the longer liver of them, place out at interest, upon good real, personal, or government securities, at their discretion, all the overplus of my personal estate, after payment of my debts and legacies aforesaid, funeral and other expences incident to this my will, upon the several trusts following; that is to say, upon trust to permit and suffer my said loving wife, and her assigns, to have and receive, and I do hereby give to her, the annual interest and proceed of my personal estate, for and during her natural life; and in case the said *Felicia Griffith* shall happen to survive my said wife, then in trust, to permit and suffer the said *Felicia Griffith* and her assigns, to receive and take, and I do hereby give to her accordingly, the interest and yearly produce of the said overplus of my said personal estate, for and during her life; and as to the said overplus of my said personal estates,

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from and after the decease of the survivor of my said wife, and the said *Felicia Griffith*, I dispose thereof in manner following; that is to say, I give to my niece *Catharine Ravenshaw*, if she be living at the time of the decease of the survivor of my said wife and the said *Felicia Griffith*, the sum of £1,000, also to my niece *Elizabeth Ravenshaw*, and my grand niece *Elizabeth Ravenshaw*, the sum of £50 each; also I bequeath to *William Minor*, of *Hopley*, in the parish of *Hadnel*, in the county of *Salop*, yeoman, the sum of £500, and I will that the said four last legacies shall be paid within the space of *six months* next after the death of the survivor of my said wife and the said *Felicia Griffith*; also, I give and bequeath all the residue and remainder of the said overplus of my personal estate and effects whatsoever, (after, and liable to the payment of the legacies hereinbefore bequeathed,) unto the said *John Wicksteed*, to and for his own use," and appointed his wife, the said *John Wicksteed* and *William Minor*, executors.

The testator died soon after making his will, without revoking or altering the same, leaving the executors, and *John Goldesborough Ravenshaw*, his heir at law, him surviving; and the executors proved the will, but *Susannah Ravenshaw*, the widow, and *John Wicksteed*, alone acted in the execution thereof. *John Wicksteed* died soon after the testator, leaving the defendant *William Wicksteed*, his brother and heir at law, who, as such, became entitled to such part of the testator's real estate as was devised to *John*, subject as aforesaid, and who also took out administration to him, and thereby became his legal personal representative. *Susannah Ravenshaw* also died, having made her will, and appointed the defendant *Hannah Davies* her executrix. *John Wicksteed* and *Susannah Ravenshaw*, both dying in the life-time of *William Minor*, he became the surviving executor of the testator. He died in the life-time of *Felicia Griffith*, and the plaintiffs are his executors, and have proved his will.

Upon the death of *Felicia Griffith*, the defendant *Wicksteed* entered into possession of the real estate devised to her for life, with remainder to *John Wicksteed*.

Felicia Griffith died 29th May, 1788; whereupon the legacy of £500 became payable, with interest, from the end of six months after her decease; and the plaintiff, after the expiration of the six months, filed the present bill for the same.

The personal estate of the testator proving deficient, the only question was, whether this amounted to a charge on the real estate?

Mr. Solicitor-General and Mr. Lloyd, for the defendants.—The object of the bill is to have this sum of £500 raised out of the real estate; but it cannot be considered as a charge, but merely as a sum to be raised out of the residue of the personal estate.

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Mr. *Mitford*, for the plaintiffs.—The construction of the will must be absurd, if this is not considered as a charge upon the real estate. He gives his household goods, &c. to his wife for life, then to *Felicia Griffith* for life, then to be part of the residue of his personal estate. He gives two small legacies, one to his wife, of twenty guineas, another to her niece, of five guineas, which are the only sums he means to be paid during the lives of his wife and *Felicia Griffith*. Then, in the disposal of his real estate to his wife for life, remainder to *Felicia Griffith* for life, remainder to *Wicksteed* in fee; in that part, he has made a general charge of debts and legacies, upon the supposition that his personal estate may be insufficient. He then disposes of the overplus of his personalty. I submit, on the consideration of the whole will, there is a manifest intent to give the real and personal estate (subject to the lives of his wife and *Felicia*) charged with debts and legacies. During the life of the two tenants for life, there is no charge, no legacies are to be paid till after their death. The matter in contemplation of the testator must have been to exempt the personal estate from payment of legacies during their lives. Then, with respect to the charge, it is absurd to suppose he thought the personal estate would be deficient as to the small legacies preceding the charge, and therefore charged the real; and that he had not the same intention with respect to the large ones. There are no words to controul the charge to the first legacies, no such words as “the legacies aforesaid,” and the latter words are not such as to controul the former. The whole argument is, that he meant the four legacies to come out of the surplus; but he calls them *legacies*; they were clearly payable out of the surplus, if sufficient, but were, otherwise, charged on the real.

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Mr. *Lloyd*, for the defendant.—It is almost impossible to say, that these were to take place as legacies; they were part of the residuary personal estate. The word *legacies* is satisfied by the two first legacies of twenty guineas and five guineas. He did not mean the legatee to be in a better situation than the wife or Mrs. *Griffith*. Neither of them could have exonerated the personal estate by charging the real. A residuary legatee cannot have assets marshalled, as a legatee or mortgagee may. The word “legacies” can only mean sums, part of my personal estate, for they are expressly to be paid by *Wicksteed* out of the personal estate. Suppose, instead of there being no personalty, there had been a small residue of £100 or £200, the tenants for life would have been entitled to that residue for life; could *Minor* have called for it to be made up out of the real estate to the amount of his legacy? If the residue would not pay £500, he could not call for it.

Mr.

Mr. Solicitor-General submitted, that the fund was to be distributed at the death of the tenant for life.

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Lord Chancellor.—It struck me at first, as being only the gift of a residue; but, upon considering the whole frame of the will, I think the testator treats it as a fund to result, and then to vest in *Wicksteed*, and to be distributed by him; who would, at the same time, take the real estate in fee. The testator thought the two first legacies would never fall upon the real estate. It is true that a real estate shall never come in aid of a residue; but when it is a new resulting fund it is different. I think here the only residue is that given to *Wicksteed* after the death of the tenants for life; and that the £1,000 and £500 must be raised out of the real estate, which must be decreed to be liable to the raising of it. What confirms this construction is, that the first legacies are so small, that it is impossible to suppose that he should think the personal estate would not pay them, and therefore give the real estate to satisfy them, and not make the same provision for the larger ones.

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HENDERSON, the plaintiff, being assignee of a lease of a public house, without any covenant restrictive of alienation without licence, by his agent, agreed with *Hay*, the owner of the land, for the grant of a lease of the same, with other premises, upon common and usual covenants. A lease was accordingly prepared, which the defendant approved, but the defendant's solicitor afterwards inserted two covenants, the one, that *Henderson* should not assign without licence from the grantor; the other, that he should not build upon a skittle-ground adjoining the premises. The plaintiff filed the present bill for a specific performance of the former contract, by the grant of a lease without such restrictive covenants.

Covenant not to assign without licence, does not come within a contract to grant a lease with common and usual covenants.

Mr. Mansfield, for the defendant, argued, that they were common and reasonable covenants, in the case of a public house; as otherwise the lessee might assign to persons of bad character, and endanger the licence; and the covenant not to build was reasonable, as it might be injurious to other property of the defendant, which was contiguous.

The covenant not to build was not resisted.

(a) Reg. Lib. A. 1791. fol. 337.

Lord

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Lord Chancellor said, common and usual covenants must mean *covenants incidental* to the lease. That though the covenant not to assign without licence, might be a very usual one, as he believed it was where a brewer or vintner let a public house, that would not make it a common covenant.

It was referred to the Master, generally, to prepare the lease, without any direction to omit the clause; but with a declaration that the defendant has no right to have a clause inserted, restraining alienation without licence (a).

(a) It having been affirmed in argument, that this was merely an opinion, and not the judgment of Lord Thurlow, the Register's book was searched to ascertain that fact, (15 Ves. 271.) from whence it appears, that it was a declaration in judgment upon the very point. Considerable difference of opinion has existed upon the subject, Lord Kenyon, in a case at Nisi Prius, *Morgan v. Slaughter*, 1 Esp. N. P. C. 8. having ruled that such a covenant was a fair and usual covenant, and that opinion was followed (in preference to Lord Thurlow's in the present case) in *Folkingham v. Croft*, 3 Anst. 700.

The point afterwards came on before Sir W. Grant, in three cases, *Vere v. Loveden*, 12 Ves. 179. *Jones v. Jones*, ib. 186. and *Browne v. Raban*, 15 Ves. 528. in which his Honor considered himself bound by the authorities of Lord Kenyon and the Court of Exchequer, though he observed that if no decision had arisen subsequent to the present case, he should have been inclined to think with Lord Thurlow, that the meaning is *incidental* covenants, not *collateral* covenants, which it might be very wise to impose, and to which many tenants would not object, but which ought to be the subject of treaty and separate agreement, not necessarily flowing from the agreement to let and take.

The point afterwards came before Lord Eldon, in the case of *Church v. Brown*, 15 Ves. 258, when his Lordship, after great deliberation and conference with Sir W. Grant, and after an elaborate and luminous review of the whole doctrine, came to the determination, that under an agreement for a lease, the lessor was not entitled to such a covenant as a *proper* and *usual* covenant. His Lordship observed, that "the safest rule of property is, that

a person shall be taken to grant the interest in an estate, which he proposes to convey, or the lease he proposes to make; and that nothing which flows out of that interest as an *incident*, is to be done away by loose expressions to be construed by facts more loose; that it is upon the party who has forborne to insert a covenant for his own benefit, to shew his title to it, and that it is safer to require the lessor to protect himself by express stipulation, than for Courts of equity to hold that contracting parties shall insert, not restraints expressed by the contract or implied by law, but such, more or less in number, as individual conveyancers shall, from day to day prescribe, as proper to be imposed upon the lessee, and that all those restraints so imposed from time to time, are to be introduced as the aggregate of the assignment." After this determination, the lessor, in the above case of *Browne v. Raban*, notwithstanding the opinion previously delivered, consented to grant a lease without that covenant, and the point may now be considered as settled upon the highest authority.

Where an assignment was, with the usual and customary covenants of the neighbourhood, it of course became necessary to enquire by a reference to the Master, whether a covenant not to assign was *customary*, &c. *Boardman v. Mostyn*, 6 Ves. 467. So also in the management of many great estates, the expression is familiar, *such covenants as are usual* in those estates, which, upon dispute, would also be matter of enquiry, as the lessee may either desire to be informed what are the covenants usually inserted in their leases, or may not enquire about them; concluding, that being submitted to by the tenants, they are reasonable, 15 Ves. 269.

The

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The Earl of DELORAINÉ v. BROWNE and Others.

THE bill stated, that in the year 1759, the plaintiff, then of the age of twenty-two years, was, under the will of his uncle, *Edward Duncombe*, Esq. deceased, seised or entitled in tail male, subject to the estate for life of *Susannah Duncombe*, the widow of the said *Edward Duncombe*, who was then sixty-eight years of age and upwards, with remainder to plaintiff's brother, the Honourable *John Scott*, in tail male, with the immediate remainder or reversion in fee-simple, to plaintiff, of or to the manor of *Holbeach*, in the county of *Lincoln*, and other hereditaments therein, which were, and had been for thirty years before, let at rents amounting to the sum of £980 a year, and also of or to the manors of *Skerne* and *Wandisford*, and divers messuages, &c. situate in *Skerne* and *Wandisford*, *Middleton*, and *Great and Little Driffeld*, in the county of *York*; which were then, and had been, for thirty years, let at rents amounting to £680 a year. That the plaintiff being, in the said year 1759, greatly distressed for money, he informed *Thomas Browne* (defendant's father), a land surveyor, of the same, and employed him to put plaintiff's interest in the several estates up to sale; and that *Browne* assured plaintiff he knew of a nobleman who would purchase plaintiff's interest, and asked him for a rental thereof; that plaintiff not being able to produce a rental, *Browne* said he would go down and survey the same; which he afterwards did, and represented to plaintiff that the value of his interest therein was worth something under £30,000, and plaintiff confiding in that representation, agreed to take such sum for his interest therein; but *Browne* afterwards, from time to time, pretended he could not get so large a price, and particularly insisted on plaintiff's not mentioning the affair to any person:

Demurrer, to a bill charging fraud in a misrepresentation of the value of an estate to vendor, on the ground that the transaction was twenty-seven years old, and had been confirmed by a deed twenty-three years since, disallowed.

That *Browne* then took opportunities of suggesting that he could not get more than £24,000 for plaintiff's interest; and that *Browne* entered into a treaty with the late Earl of *Egremont*, to sell to him plaintiff's interest for £24,000, who refused to treat further, from being satisfied that £24,000 was not nearly the value of plaintiff's interest; that at length *Browne* represented to plaintiff, that he could not procure any person to purchase plaintiff's interest in the estates, but intimated his hope that he could procure a friend to purchase plaintiff's interest in the *Lincolnshire* estate, and that he might be able himself to purchase plaintiff's interest in the *Yorkshire* estate: and that he should endeavour to sell the *Lincolnshire* estate for £7,000, and an annuity of £400 for the life of plaintiff; and that he would give for the *Yorkshire* estate the gross sum of £1,941. 10s. and an annuity of £600 for the life of plaintiff; and proposed that £2,000, part of the said sum

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sum of £7,000, and £1,000, part of the £1,941. 10s. should be paid to said *John Scott*, as a consideration for his joining plaintiff in levying fines of both estates, in order to bar the estate tail, and make a good title to the purchasers, subject to the life estate of said *Susannah Duncombe*; having advised plaintiff not to apply to said *Susannah Duncombe* to join in suffering a recovery of the estates, because he apprehended, if any such application was made, plaintiff might be informed of the value of the estates; and *Browne* represented to plaintiff, that the said sum of £7,000 and £1,941. 10s. and the annuities of £600 and £400 for the life of plaintiff, were equal in value to the sum of £24,000, which plaintiff believed, as well as that £24,000 was the full value of his interest in the estates; and that plaintiff acceded to the proposal, and permitted *Browne* to carry the same into execution as he should think fit; and *Browne* having procured one *John Calcraft* to purchase the *Lincolnshire* estates, they were conveyed to him and his heirs, subject to the life estate of *Susannah Duncombe*, and the plaintiff, and *John Scott* levied a fine of them:

That by indentures of lease and release, dated 17th and 18th June, 1760, in consideration of £1,000 paid to *John Scott*, in part of the gross sum of £1,941. 10s. and also in consideration of £941. 10s. the remainder thereof, paid to plaintiff, and of an annuity of £600 secured to be paid plaintiff for life, the *Yorkshire* estates were conveyed to trustees, in the first place, to secure the payment of the annuity; remainder to the use of *Browne*, his heirs and assigns for ever; and the plaintiff and *John Scott* covenanted to levy a fine of the said premises; and which fine was afterwards levied:

That out of the monies that plaintiff was to receive for the estate, *Browne* insisted upon retaining £1,000 for his agency and trouble, and did actually retain £500 on that account:

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That the plaintiff not being relieved from his distresses by the money received, applied to *Browne* to lend him money on the security of the annuities of £400 and £600, who declined so doing, but referred plaintiff to *Palmer*, his attorney, to procure the loan he wanted, who procured plaintiff the sum of £620, upon an assignment of the annuity of £400, for two years, and plaintiff charged, that the said £620 was the proper money of *Browne*:

That continuing in distress, the plaintiff about six months afterwards, requested *Browne* to lend him some money, who again referred him to *Palmer*, who procured him £700, in consideration of which, the plaintiff sold an annuity of £100, part of the said annuity of £400, to ———, a hosier, and the £700 was the money of *Calcrafft*, and the assignment of £100 a year was made in trust for him; so that although plaintiff had been persuaded, that the annuity of £400 was worth sixteen years purchase, when granted by the said *John Calcraft*, plaintiff was ob-

liged

liged to take from the said *John Calcraft* only seven years purchase for the said £100 a year payable out of the said £400 a year :

That about the month of *April*, 1763, *Susannah Duncombe* died, and *Browne* took possession of the *Yorkshire* estate, and soon after her decease, plaintiff received some imperfect information, that the value of the estates was greater than it had been represented to him by *Browne*, and for some time withheld the title deeds from him and *Calcraft*, and informed *Browne* of what he had heard, who thereupon declared he had but roughly surveyed the estates when he went down for that purpose, but that he would go down again and survey the estates in a proper manner, and that if he should find he had been mistaken, plaintiff should instantly have the full value thereof :

That soon afterwards, *Browne* again surveyed the estates, and upon his return, represented to plaintiff, that the full value of all the estates in possession was £40,000, but that plaintiff was bound by his bargain ; however, that as *Susannah Duncombe* had died so soon, and they the said *Browne* and *Calcraft* had therefore made an advantageous bargain, they would, as a matter of compliment, give plaintiff the sum of £10,000, if he would confirm the sale to them ; and plaintiff not accepting the offer immediately, *Browne* employed severe threats of advertising plaintiff as a rogue, if he withheld the title deeds from him and *Calcraft*, and *Calcraft* used threats to the same purpose ; by which plaintiff being intimidated, and being greatly in want of money, he acceded to the terms proposed by *Browne*, and the title deeds were delivered to *Browne* and *Calcraft* ; but they alleged, that they could not pay plaintiff any more than the sum of £1,500 in cash, and *Calcraft* agreed to procure the re-assignment of the £100 a year, which was accordingly re-assigned, and *Browne* and *Calcraft* paid plaintiff the sum of £1,500, but previous to the payment of the same, deeds were prepared by *Browne's* attorney, intended to operate as a confirmation, and by these deeds, bearing date 9th and 10th *February*, 1764, reciting the former indentures of lease and release of the 17th and 18th *June*, 1760, and that by the death of *Susannah Duncombe*, *Browne* had become entitled to the *Yorkshire* estates, subject to the annuity of £600 ; to the plaintiff for life, and that *Browne* had accordingly been in the receipt of the rents and profits, from the decease of *Susannah Duncombe*, and had paid the annuity of £600 to plaintiff, till the then *Christmas* last, and that by the particular event of *Susannah Duncombe's* dying within so short a time after the contract, the same was become a very advantageous contract to said *Browne*, and that several of the deeds and writings relating to the title of the estate, being in the hands of the personal representatives or agents of the said *Susannah Duncombe*, and they declining to deliver the same up without an express authority, in writing, from plaintiff

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tiff so to do, therefore he had applied to plaintiff for such order, and to join and concur with him (*Browne*) in pursuance of the covenant for further assurance, in doing all acts necessary for suffering a common recovery, wherein plaintiff might be vouched of the said premises in the county of *York*, to the uses in the said indenture expressed, and that plaintiff had agreed thereto, upon *Browne's* paying to him the sum of £1,500, it was witnessed, that in pursuance of the contracts recited, and of the several sums paid, and for further securing the annuity, the said estates were conveyed to trustees, to hold the same to the use and intent that plaintiff should receive for life the annuity of £600, with proper powers of entry and distress for the same, and subject thereto, to the uses in the former indenture contained, and plaintiff released all claims and demands except the annuity :

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That *Browne*, very soon after the execution of this last deed, raised the rents of the *Yorkshire* estate to about £1,000 a year, and it has been since let for above £1,400 a year, but neither *Calcraft* or *Browne* ever paid to plaintiff, or to his use, any money on account of the £10,000, so that the whole consideration paid by *Browne*, for the purchase of the said manors and estates in the county of *York*, was no more than the sum of £3,441. 10s. inclusive of the said sum of £1,500, and an annuity of £600, for the life of plaintiff, although the estates were, at the time of the execution of the said indentures of lease and release, worth to be sold at least £30,000, and the interest of plaintiff and his brother therein, in the year 1760, were, and were then known to *Browne* to be, worth £24,000.

The bill therefore charged that *Browne* was guilty of gross fraud towards plaintiff, and a manifest breach of the trust reposed in him, and that he was, in his life-time, and his representatives now are liable to answer to plaintiff for the value of the *Yorkshire* estate, and of the plaintiff and his brother's interest in the estate which *Browne* prevailed on him to sell to *Calcraft* aforesaid, and which were worth at the time of the sale £35,000, and that *Browne* received some premium or acknowledgment from *Calcraft*, for his assistance in the said purchase : and that *Browne* was, in his life-time, and his representatives now are liable to answer to plaintiff, for the breach of trust of which *Browne* was guilty in that respect, at least to answer for whatever benefit he received from *Calcraft*. And the bill stated frequent applications to *Browne*, for a reconveyance of the *Yorkshire* estate, or to pay the value thereof.

The bill further stated, that plaintiff, soon after the year 1764, was under the necessity, on account of his distresses, of residing abroad, and has altogether, since the year 1764, been in a state of such poverty that he has not been able, until this time, to apply to any court for relief, touching the matters aforesaid, and has been obliged, on account of his distresses, to sell the annuity of

of £600, which, or the greatest part thereof, has vested in the defendants, as executors of *Browne*, or in persons in trust for them.

It then stated, that *Browne* died in *March* 1780, leaving the defendant *William Browne*, his only son and heir at law, and having made a will and codicil, (the dispositions of which the bill stated) and thereby appointed the defendants *William Browne* and *Charles De Laet*, executors thereof, who had proved the same, and it stated applications to the defendant *William Browne* as heir, to re-convey the *Yorkshire* estate, upon plaintiff's making all due allowances.

The bill therefore prayed, an account of rents and profits of the estate, &c. and of the annuity, and that so much as should appear on the balance to be due to plaintiff, should be paid to him, and the defendant *Browne* be decreed to re-convey, or that plaintiff might receive, out of the personal estate of the late *Thomas Browne*, satisfaction for the full value thereof, &c.

To this bill the defendants put in a general demurrer, and for cause shewed, that the plaintiff had not shewn any title in equity, to call the defendants in question, touching the matters therein contained, and more especially it appears by the bill, that the last transactions sought to be impeached thereby, happened in the month of *February*, 1764, twenty-eight years before the filing plaintiff's bill, and plaintiff hath not by his bill shewn any just cause why he hath not sooner instituted his suit, wherefore, &c.

Mr. Solicitor-General, Mr. Mitford, and Mr. Campbell, in support of the demurrer.—The bill is filed to set aside a bargain made in the year 1760, and does not state that the plaintiff has made any discovery now, that he had not in 1764, when he confirmed the bargain. At present we must admit the facts stated to be true, for the purpose of arguing upon them; for though the demurrer admits they can be proved, it does not prevent their being met by argument; but if they were in proof, still there could be no relief at this length of time, although, if recent, there might have been relief. It is merely an equitable title, and it is a rule that an equitable title may be barred by time. If a party chooses to act on a bargain from 1760 till 1792, he ought not then to be permitted to impeach it. *Browne* lived from 1764, when the bargain was confirmed, till 1780, without any complaint of the bargain during that time. The plaintiff says he was abroad, and in distress, but that distress did not prevent him from applying to *Browne*; he received £600 a year out of the effect of this contract. In respect to confirmation, it is true that the party must be *sui juris*, and the confirmation must be an act of the same kind with the first transaction; but he surely cannot, after acquiescing twenty-eight years, come to impeach the contract. If that time will not be sufficient to bar, it does not appear that any length of time can do so: but it is certainly necessary

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sary some length of time should have such effect. It is true, the time is in the discretion of the Court; but the Court has governed that discretion by the practice of the courts of law, and has said, that after twenty years, it will not give relief; as that is the time, after which a court of law will not interfere. Thus, after twenty years, let the case be ever so strong, this Court will not permit a bill of review, as appears by the case of *Smith v. Clay*, Ambl. 645. * which was a petition for a bill of review, upon error on the record;

S. C.
Harg. MSS.
Mus. Brit.
No. 330.

* *Smith v. Clay*, 10th May, 1767.—The Reporter having been favoured with a more accurate note of Lord Camden's judgment in this case than has hitherto appeared in print, he flatters himself the publication of it will be acceptable to the profession, and has therefore inserted it here.

Lord Chancellor.—This bill of review is between thirty and forty years after the decree pronounced.

There is manifest error upon the face of the record.

The question upon this petition is, whether it is barred by length of time.—I am of opinion it is.

It would be an useless curiosity to trace backwards the origin of this proceeding.—It is at this time perfectly understood.—It is in nature of a writ of error, to reverse a decree, for error apparent upon the record.

This is the bill of review now before me, and to this my opinion shall be confined.

There are two questions. First, what period of time is a bar to a bill of review? Second, from what time this period shall be computed? To the first question, the answer here is easy.—Twenty years is the period. *Edwards v. Carrol*, (5 Bro. P. C. 466.) is decisive, and not now open to argument.

A court of equity, which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time.—Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive and does nothing.

Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this Court. Therefore in *Fitter v. Lord Macclesfield*, Lord North said rightly, that though there was no limitation to a bill of review, yet after twenty-two years, he would not reverse a decree but upon very apparent error.

“*Expedit reipublicæ ut sit finis litium*,” is a maxim that has prevailed in this Court in all times, without the help of an act of parliament.

But as the Court has no legislative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year; it was governed by circumstances.—But as often as parliament had limited the time of actions and remedies, to a certain period, in legal proceedings, the Court of Chancery adopted that rule, and applied to similar cases in equity.—For when the legislature had fixed the time at law, it would have been preposterous for equity, (which, by its own proper authority, always maintained a limitation) to countenance laches beyond the period that law had been confined to by parliament. And therefore in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar.

Thus the account of rents and profits, in a common case, shall not be carried beyond six years.—Nor shall redemption be allowed after twenty years possession in a mortgagee.

Jenner v. Tracy, 1731. (Marginal notes on 3 Will. 287.)—Same thing in *Belch v. Harrey*, (ubi sup.) adding, that the statute having given ten years after disability, that ought to be observed.

By the like analogy, the House, in *Edwards v. Carrol*, determined that twenty years should bar a bill of review, because the statute of Wil. 3. had barred all writs of error, after that period.

I have

record; Lord Camden said, "This bill of review is like a writ of error to reverse a decree. This is a different case from a bill of review

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I have said too much perhaps upon this point, which is now settled; but the grounds of that decision may perhaps be useful in deciding the next point;—which is, whether this twenty years is to be computed from the time the decree is pronounced, or from the actual enrolment.

For the petitioners contend, that you must compute your time from thence.

If that should be the rule, the limitation would be more unsettled since the act of parliament, than it was before.

For, as the time of enrolling is uncertain, the bill of review would be left open, or concluded, according to that event.

Thirty years would be a bar in one case, and three hundred in another; and if thirty years, in the present case, is to be added to thirty-five already past, this cause cannot be at an end till fifty-five years are elapsed after the decree.

Thus the act of parliament, which is adopted here to fix the time, would unfix it more, and extend it to a greater length than it stood at by the natural jurisdiction of the Court. This consideration alone is sufficient to shew, that the enrolment, which is the work of chance, cannot be the time from whence the twenty years are to be computed.

But to make the matter more clear, I will prove.—1st. That the time must be reckoned from the pronouncing the decree.—2d. If the enrolment can be material in the consideration of this question, it must relate back to that time, and there can be no averment against it.

First, what is the true reason why suits and remedies are barred by length of time?—Because the party has acquiesced or neglected to pursue his remedy.

And the public peace requiring an end of suits, he abandons this right by submission, or forfeits it by neglect.

From what time does this neglect or submission begin to run?—From the time the party is aggrieved.

When aggrieved? When the decree pronounced, from which time he is bound.

Then it is that his right to reverse commences.

At law, the writ of error takes place from the day of the judgment; and the party goes from court to court, till he arrives at parliament.

In this court, besides his appeal to parliament, he has two other ways of reversing; by re-hearing, or bill of review.

But as the act of parliament gives but twenty years to all the writs of error, this court, by analogy, will give no more to the remedies of that nature here.

And although it is absurd to suppose, that any man would enrol for the sake of a bill of review, when he has a much more extensive remedy upon the merits of his case, by re-hearing or appeal; yet he may, if he pleases, enrol immediately after the decree.

Look into all the statutes of limitation, you will find the time begins to run from the time the title accrues, or the party is aggrieved.

In ejectment it runs from the time when the possession is withheld; the same in all real actions; in personal, from the time the debt or demand arises, and is not paid or satisfied.

To bring the case before us under the stat. Will. 5.—It must run from the time of the fine levied, or the recovery suffered; and the title accrued; because from thence the wrong commences.

In the case of a judgment.—From the signing, or from the entering on record; that is, from the day of the judgment: for it is to be understood that, although the statute of frauds requires the judgment to be dated, when it is signed; that is only necessary to bind the land against purchasers.

But if a judgment is signed at this day without a date, or with one, it still relates to the first day of term, and is a complete judgment from that time. Balk. 401. Duke of Norfolk's case.

And as that possibly might be the case, though it hardly ever happens; the act is correct in dating the commencement of the limitation, from the day it would relate to, in every other case where a purchaser was not concerned.

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review brought on new evidence, I confine myself to bills of review, for error apparent." And then said, "that twenty years was the proper period." There are several cases where the Court has thought twenty years the proper period, as in cases of trust, for though a trust continues for ever, and is a continuation of the same estate, yet where fraud intervenes, it becomes an adverse possession. The statute of limitations may be pleaded in the case of a fraud, unless stated not to be discovered within six years, *South-sea Company v. Wymondsel*, 3 P. W. 143. Fraud is a matter of fact, and there is just as great danger of evidence being lost in that as in other cases of fact. So in the case of redemption of a mortgage, twenty years is considered as a bar to redemption, even though fraud is charged, *Winchcombe v. Hall*, 1 Ch. Rep. 40. Here the inconvenience of entertaining the suit is manifest on the face of the bill;

This Court, therefore, from the reason of the thing, as well as from the example of all the statutes of limitation, and more particularly the stat. of Will. 3. which is in the very point, will begin to reckon from the day when the decree was pronounced.

From that time the laches commence; and when the statutable time is elapsed, the door is shut for ever.

But if the inrolment could be material in this question, the determination must be the same, because the *inrolment must be carried back to the time of the decree*, and there can be no averment against it.

What is the inrolment but the engrossing the decree in parchment? An act that cannot possibly vary the rights of the parties. It is the very speech of the court at the time, and is *always in the present tense*.

As it is impossible either to enter or inrol the decree in form immediately after it is pronounced, the course of business makes it necessary to give some time to make up the record, which is six months; and the courts of law do the same thing, for there the roll is to be brought in the next term after the judgment.

This is hardly ever done; but although it is omitted, the party does not lose the benefit of his judgment, but upon paying the post term-fee may bring in his roll at any time, and when the record is once made up, it *relates to the first day of the term, when judgment was given*, and this is done without motion.

How is it here? Exactly the same in effect, for though you must obtain an order to inrol here after the time past, yet the order is of course and without notice, nor can any thing ever stay the inrolment but a caveat, in order to re-hear the cause.

If that is not done the inrolment will proceed, and it is impossible to shew cause against the order, or to discharge it.

The order is always *nunc pro tunc*, what does that mean?—That it shall be the same thing as if it had been done in due time, to all intents and purposes.

And by the course of the court you obtain the like order for entering the decree.

And to shew how very immaterial the inrolment is to any real purpose, the parties have a right, not only to carry the decree into execution, but to appeal to the House of Lords without it; and that is the constant practice, and is indeed proved by the Lords order to appeal within fifteen days after decree pronounced, if pronounced during the sessions.

When the inrolment then takes place *nunc pro tunc*, it *must relate to the time of the decree*, and the record ought no more to be contradicted here than at law. For if you could in this instance aver against the record, the order *nunc pro tunc* is a nullity.

How far the House of Lords will adopt this reasoning, when the question comes before them upon the bar, is not for me to determine: but I will venture to declare that I will not consent to re-hear a cause which has slept twenty years from the time of the decree.

The petition must be dismissed.

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the death of *Browne* produces an inconvenience; had he been alive, he might have stated many circumstances the present defendants cannot; another inconvenience from the length of time is, that *Browne*, resting on the property as his own, has looked to it in the distribution of his other property among his children; so that great injustice would be done to the son, if this was taken out of the share allotted to him. It has been made the subject of a marriage settlement, by the present Mr. *Browne*, who has lived twelve years on the presumption of its being his property. On the face of the bill, the acquiescence of the plaintiff is as much a fraud as any he imputes to *Browne*. In the case of *Lord Warrington v. Booth*, as cited 3 P. W. 144, Lord *Warrington's* decree went on his shewing the fraud to be within six years. In *Cook v. Arnham*, 3 P. W. 283, though the length of time which would not bar an ejectment was held not to bar a bill in equity, it appears by Mr. *Peere Williams's* note on the case, that twenty years was considered as a length of time to bar a redemption of a mortgage; and Lord *Kenyon*, in a case before him, was of opinion, upon a demurrer to a bill to redeem after twenty years, that it ought to be allowed, *Beckford v. Close*. If any limitation is necessary, that which has been admitted is a fair one, and may be permitted to prevail.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Richards*, for the plaintiff. —The demurrer is principally founded on the length of time that has passed since the transaction: but length of time has never been admitted as an answer to a demand founded in fraud, or breach of trust; and a grosser fraud than the present never was stated to a court of justice. In *Maxims in Equity*, the case 1 Ch. Rep. 40. is cited: it says that the Court declared that they would not relieve after twenty years, and *two purchases*; if they would not have relieved after twenty years only had passed, there was no occasion to mention the two purchases. In *Forrester* 63, Lord *Talbot* says, no length of time will bar a fraud. So in *Bicknell v. Gough*, 3 Atk. 558. the statute of limitations cannot be pleaded where fraud is charged. If it were at law the defendant could not plead the statute of limitations, *Bree v. Holbeck*, Doug. 655. Here the *Solicitor-General* admits, if it was a recent case, the plaintiff might have relief; but the answer to his not coming sooner for relief is, that the plaintiff has been always under a pressure of distress, arising from the imposition of the defendants, which is a strong argument against any objection arising from the length of time; to maintain their argument on the subject, the counsel on the other side should find some rule that the Court will not relieve after twenty years. It is true, that, with respect to letting the mortgagor in to redeem, they have fixed twenty years as the period: but there is no case of fraud or breach of trust where the same period has been fixed; *Smith v. Clay*, only goes to the practice in the case of a bill of review.

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Mr. Solicitor-General, in reply.—Length of time, accompanied by circumstances like the present, constitutes a bar; and if the Court ought to dismiss the bill on a hearing upon that ground, they ought to allow the demurrer. Length of time will operate as a reason, at the hearing, for dismissing the bill, though that length of time is indefinite, and in the breast of the Court; as there are cases in which twenty years would be too long, and others where one hundred would be too short. Length of time, of itself, will amount to a confirmation. In *Chesterfield v. Janssen*, 2 Ves. 125. it was considered as proving, either that the first transaction was not fraudulent, or that the party had confirmed it with his eyes open. There is a great difference between cases of fraud and cases of breach of trust; and between fraud discovered and fraud undiscovered. In the present case, if there was any fraud, the plaintiff knew it as well in 1764 as he does now: he then knew what bill to file; and that he stood in the light of a mortgagor, and might come to redeem. The reason why the statute of limitations does not apply to cases of fraud, is, that fraud is a secret thing, 2 Atk. 561. but if a fraud has been discovered six years, then the statute of limitation will run, Dougl. 655. As to the case of *Bicknell v. Gough*, it was a plea to the discovery and relief, without confessing the truth of the bill. The Court seems to have adopted the rule, by analogy, to the practice of courts of law. What was the determination on the subject of a bill of review? Certainly upon the interest of the public *ut sit finis litium*. It is a time fixed by policy. If they had stated this transaction as being recent, we should have pleaded that they knew it twenty-seven years ago.

Lord Chancellor.—The bill states a fraud in the years 1760, and 1764, by misrepresentation as to the value of the estate; and the plaintiff states himself as having being deceived; I am desired by the defendant, to gather, from the circumstances of the case, and from the length of time, that the plaintiff acted with his eyes open, and that he confirmed the transaction at some period since 1764, but it does not appear when he was undeceived: this puts it out of the common cases; and the only question is, upon the *dicta*, that length of time cannot be taken advantage of upon a plea or demurrer. It might as well be taken advantage of by a plea of the statute of limitations as any other way.

Demurrer over-ruled (a).

The next day **Lord Chancellor** explained the grounds on which he had disallowed the demurrer in this case, by saying, that length

(a) For the cases upon the subject of length of time not being a bar in cases of fraud, vide Mr. Merivale's note to *Whalley v. Whalley*, 1 Meriv. 436. The Editor's note to *Alden v.*

Gregory, 2 Eden, 285. *Pickering v. Earl of Stamford*, post, vol. iv. 214. *Hercy v. Dinwoody*, ib. 257. *Lytton v. Lytton*, ib. 441.

of time, *proprio jure*, was no reason for a demurrer; that it was only a conclusion from facts, shewing acquiescence, and was not matter of law: that he could not allow a party to avail himself of an inference from facts, on a demurrer.—He desired it might be attended to, that this would not affect the weight of such circumstances at the hearing (a).

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(a) The authorities are much at variance, as to whether a defence founded on the presumption raised by length of time, may be taken advantage of by demurrer. Lord Hardwicke, in *Aggas v. Pickerell*, cit. sup. and *Gregor v. Molesworth*, 2 Ves. 109, Lord Thurlow, in the present case, and Lord Rosslyn, in *Edsell v. Buchanan*, (as stated in a note, 3 P. W. 287. though it does not appear from the report of that case, post, vol. iv. 254. or 2 Ves. jun. 83.) appear to have been of opinion, that it could not. On the other hand, are the authorities of *Frazer v. Moor*, Bunb. 54. *Jenner v. Tracy*, 3 P. W. 287, n. and particularly the case of *Beckford v. Close*, at the Cockpit, (cit. sup. and 4 Ves. 476. 19 Ves. 184. and Mitf. Pl. 174, n. nom. *Tobin v. Beckford*.) where Lord Kenyon, upon great consideration, and after a review of all the authorities, decided that a demurrer to a bill for redemption is good, in which he has been followed by Sir T. Plumer, in *Hodde v. Healey*, 1 Ves. & Bea. 536. If however, the question can, upon these conflicting opinions, be still considered open to discussion; the following note of what fell from Lord Thurlow, on the present occasion, which has been preserved by Lord Redenale, contains reasons so conclusive and satisfactory, that it appears difficult to withhold our assent from them: "The party who demurs," said his Lordship, "admits every thing well pleaded, in manner and form as pleaded; and a demurrer ought therefore in a Court of law, to bring before the Court a question of law merely; and in a Court of equity, a question of law or equity merely. The demurrer therefore must be taken to admit the whole case of fraud made by the bill, and the argument to support it must be, not that a positive limitation of time has barred the suit, for that would be a pure question of law, but that from long acquiescence, it should be presumed that the fraud charged did not exist, or that it should be intended that the plaintiff had confirmed the transaction, or had

released or submitted upon such consideration as to bar himself from the general equity stated in the bill. This must be an inference of fact, and not an inference of law; and the demurrer must be over-ruled, because the defendant has no right to avail himself by demurrer of an inference of fact, upon matter on which a jury in a Court of law would collect matter of fact to decide their verdict, if submitted to them, or a Court would proceed in the same manner in equity. What limitation of time will bar a suit, where there is no positive limitation, or under what circumstances the lapse of time ought to have that effect, must depend on the facts of the particular case, and the conclusion must be an inference of fact, and not an inference of law, and therefore cannot be made on a demurrer."

But where the defence is not a presumption from long acquiescence, but a positive limitation of time, which the Court, by analogy to the statute of limitations adopts, it may clearly be taken advantage of by demurrer, as in *Foster v. Hodgson*, 19 Ves. 180. where the plaintiff, upon a bill for an account, stated that no demand had been made for twelve years, a demurrer upon the statute of limitations was allowed. Lord Eldon, in that case, speaking of *Beckford v. Close*, observed, that as the limitation of an ejectment does not hold in the cases of exception, infancy, &c. so according to the rule (derived from that analogy) by which Courts of equity have bound themselves, it does not follow from uninterrupted possession for twenty years, that there may not be a redemption, that the analogy to the rule of law does not bind to the form of proceeding there; and therefore his Lordship considered that case as establishing that a plaintiff in equity should state upon his bill the circumstance which takes his case out of the rule as to twenty years, and if he does not do so, that a Court of equity ought not, upon the supposition that he could do so, to harass the other party;

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party; that there is less inconvenience in requiring a plaintiff to put his case of exception upon the record in the first instance, than in permitting him to go on to establish it at a great expense; and Lord *Redesdale*, in speaking of this case in *Horenden v. Lord Annesley*, 2 Sch. & Lef. 638, supports this opinion.

The application of this doctrine, therefore to the present case will be found to reconcile it with the decision of Lord *Kenyon*. If a plaintiff merely states a claim founded on such a distance of time as that the Court, upon the analogy it has adopted with respect to the statute of limitations, will

refuse to assist, he may then be considered as having stated himself out of Court, and he may be told that if any peculiar circumstance existed in his case which would have entitled him to relief, he ought to have brought them forward on the record. But where as in the present case he alleges a case of fraud, this circumstance (upon the well known doctrine of a Court of equity, that no length of time can bar a fraud) may be considered as forming such an exception to the rule adopted by the Court, in analogy to the statute, that the plaintiff shall be entitled to an answer to the case so stated.

Friday 15th of June, the Lord Chancellor sat in the morning to hear causes; he afterwards went to the House of Lords and prorogued Parliament; and from thence to a Court held at *St. James's*, where he resigned the Great Seal into the hands of his Majesty, who delivered the same to Sir *James Eyre*, Lord Chief Baron of the Exchequer, Sir *William Henry Ashhurst*, one of the Justices of his Majesty's Court of King's Bench, and Sir *John Wilson*, one of the Justices of his Majesty's Court of Common Pleas, as Lords Commissioners for the custody thereof.

END OF THE THIRD VOLUME.

S. BROOKE, Printer,
35, Paternoster Row, London.



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